Newport News Shipbuilding & Dry Dock Company *and* United Steelworkers of America, AFL-CIO-CLC. Cases 5-CA-11338 through 5-CA-11342, 5-CA-11344 through 5-CA-11348, 5-CA-11350 through 5-CA-11353, 5-CA-11356, 5-CA-11358, 5-CA-11360 through 5-CA-11366, 5-CA-11410, 5-CA-11433, 5-CA-11435, and 5-CA-11480

December 8, 1982

DECISION AND ORDER

BY CHAIRMAN VAN DE WATER AND MEMBERS FANNING AND JENKINS

On February 12, 1982, Administrative Law Judge Leonard M. Wagman issued the attached Decision in this proceeding. Thereafter, Respondent and the Charging Party filed exceptions and supporting briefs, and Respondent filed an answering brief to the Charging Party's exceptions.[1]

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[2] and conclusions[3] of the Administrative Law Judge and to adopt his recommended Order.

[1] Respondent has requested oral argument. This request is hereby denied as the record, the exceptions, and the briefs adequately present the issues and the positions of the parties.

[2] Respondent and the Charging Party have excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

The Administrative Law Judge's Decision, in the second sentence of the fifth paragraph of the discussion regarding employee Joe Will Hardy, refers to "Hardy." It is clear from the context that the name should be "Duke." And, in the first sentence of the penultimate paragraph of the discussion regarding employee Tyrone Smith, the Decision refers to "May 7," whereas the correct date is "March 17." We herewith correct these inadvertent errors.

[3] In adopting the Administrative Law Judge's determination that employee Jerry L. Justice's conduct was serious enough to warrant discharge, we rely only upon his finding that Justice deliberately inflicted damage on a nonstriking employee's vehicle.

Chairman Van de Water does not agree with his colleagues that, where an employee has made an implied or stated threat of physical contact with a nonstriker, has actually made physical contact with a nonstriker, has caused or attempted to cause property damage, or has directly interfered with police officers attempting to maintain public order, it is appropriate for the Board to require an employer to reinstate that wrongdoer. See, e.g., *Associated Grocers of New England, Inc.* v. *N.L.R.B.*, 562 F.2d 1333, 1336-37 (1st Cir. 1977). In this case, the following individuals were convicted by a court of misdemeanors and engaged in conduct covered by at least one of the above categories: Johnny H. Bradley, Charles Cox, David R. Davis, Earl Evans, Wayne Fisers, James A. Fountain, Brad N. Harrison, James P. Justice, Jerry L. Lewis, Tyrone Smith, Jeffrey R. Trussell, Jack P. Welsh, Robert R. Perry, Norman Young, Frances E. Price, and Cyrus L. Flenner. Chairman Van de Water believes that to require an employer to reinstate employees guilty of the kind of conduct engaged in by the named individuals—conduct which would make their presence undesirable because of the disruptive effect it would have upon the post-strike environment at the employer's plant—is not in accord with the objective for which the Board was established.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Newport News Shipbuilding & Dry Dock Company, Newport News, Virginia, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order.

DECISION

STATEMENT OF THE CASE

LEONARD M. WAGMAN, Administrative Law Judge: Upon charges filed by the United Steelworkers of America, AFL-CIO-CLC, referred to below as the Union, the Regional Director for Region 5 issued a complaint on January 22, 1980, in Cases 5-CA-11338 through 5-CA-11342; 5-CA-11344 through 5-CA-11348, 5-CA-11350 through 5-CA-11353; 5-CA-11356; 5-CA-11358; 5-CA-11360 through 5-CA-11366; 5-CA-11410; 5-CA-11433; and 5-CA-11435. Thereafter, upon a further charge filed by the Union in Case 5-CA-11480,[1] the Acting Regional Director for Region 5 issued a second complaint on March 26, 1980. Thereafter, by his order dated May 20, 1980, the Regional Director for Region 5 consolidated the two complaints for hearing. The consolidated complaint, as amended at the hearing, alleges that the Company, Newport News Shipbuilding & Dry Dock Company, violated Section 8(a)(3) and (1) of the National Labor Relations Act, as amended (29 U.S.C. § 151, *et seq.*), referred to below as the Act, by suspending, discharging, and failing to reinstate certain employees who participated in a protected strike against the Company. The Company, by answers to the complaints denied the commission of any alleged unfair labor practices. The hearing in these consolidated cases was held before me in 1980, on June 16-20 at Newport News, Virginia; on July 7-11 at Hampton; on July 14 and 15 at Newport News, Virginia; on July 16-18 at Hampton, Virginia; on July 21-24, and on September 22 and 23 at Newport News, Virginia. Upon the entire record in these cases, and from my observation of the demeanor of the witnesses, and after having considered the briefs filed by the General Counsel and the Company, I make the following:

FINDINGS OF FACT

I. THE COMPANY'S BUSINESS

Respondent, a Virginia corporation, engages in the construction and repair of oceangoing vessels at its Newport News, Virginia, facility. Respondent, in the course

[1] At the hearing upon motion of the General Counsel to sever, and the Charging Party's motion to withdraw the charge in Case 5-CA-11349, I dismissed so much of the complaint as pertained to that case number. The listing of case numbers in the title of this case reflects my disposition of Case 5-CA-11349.

and conduct of its business operations, annually purchases and receives, in interstate commerce, materials and supplies valued in excess of $50,000, directly at its Newport News, Virginia, location, from points located outside the Commonwealth of Virginia. From the foregoing facts, which Respondent has admitted, I find that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

Respondent admits, and I find, that United Steelworkers of America, AFL-CIO-CLC, is and has been at all times material to these cases a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. *Background and Issues*

On October 27, 1978, the Board certified the Union as the collective-bargaining representative of the Company's approximately 19,000 production and maintenance employees at its Newport News facility.[2] Thereafter, the Board also found that the Company violated Section 8(a)(5) and (1) of the Act on November 2, 1978, by refusing the Union's request that it recognize the Union and bargain concerning rates of pay, hours, and other terms and conditions of employment for the production and maintenance unit. *Newport News Shipbuilding and Dry Dock Company*, 239 NLRB 1028 (1978), enfd. 608 F.2d 108 (4th Cir. 1979).

On December 10, 1978, the bargaining unit employees authorized the Union to call the strike which began on January 31, 1979,[3] and ended on April 23, in which 13,000 bargaining unit employees participated. On the latter date, the Union terminated the strike and made an unconditional offer to return to work on behalf of the striking employees.

Among the striking employees who sought reinstatement were the following, whom the Company first suspended and then terminated:

	Suspended	*Terminated*
Johnny H. Bradley	April 23 - May 17	May 17
Norman Young	April 28 - on or about May 16	
Deborah Clark	April 16 - May 16	May 24
Charles Cox	April 23 - May 16	June 16
James A. Fountain	April 23 - May 16	June 29
James P. Justice	April 23 - May 9	May 17
Jerry L. Justice	April 23- May 16	June 13
Jeffrey R. Trussell	April 25 - May 16	June 14
Jack P. Welsh	April 23 - May 20	June 29
William Whitt	April 23 - May 16	June 27
Brian Ribblett	April 24 - May 10	June 14
Cecil E. Ward	April 27 - May 16	May 24
Frances E. Price	April 23 - May 17	August 30
Cyrus L. Flenner	May 3 - May 16	August 2
Stanley E. Holmes	April 19 or 20 - May 16	August 29

The Company also terminated the following employees who had engaged in the strike, and sought reinstatement.

	Terminated
Orvel L. Chambers	April 23
David R. Davis	April 23
Earl Evans	April 23
Wayne Fisers	April 23
Joe Will Hardy[4]	April 23
Brad N. Harrison	April 23
Andrew Lewis	April 24
Jerry L. Lewis	April 23
Tyrone Smith	April 23
Arizona White	April 25
Robert R. Perry	April 24
Robert L. Williams, Jr.	April 25

The issues presented in this case are (1) whether the strike was caused by the Company's unlawful refusal to bargain with and recognize the Union in violation of Section 8(a)(5) and (1) of the Act; and (2) whether the Company violated Section 8(a)(1) and (3) of the Act by suspending, discharging, and refusing to reinstate employees who participated in the strike.

B. *The Strike*

On December 5, 1978, the Union distributed copies of its local's newspaper, "The Voyager," which announced a meeting of the Union's members on December 10, 1978, at which the bargaining unit employees would "decide how to respond to the company's [sic] refusal to bargain, . . . whether to wait while the charges filed against the company [sic] go through the judicial system, or to take action on their own to enforce the law by authorizing a strike." At another point, the article stated: "If the motion is put on the floor, the members will be asked to authorize a strike."

On December 10, 1978, approximately 7,000 company employees who also were members of the Union's Local 8888 met at the Hampton Coliseum. Jack Hower, a union official, told the membership of the Company's refusal to bargain. He suggested "that it was now time for the membership of the local union to make a decision." Local 8888's president, Wayne Crosby, and a union official, Bruce Thrasher, echoed Hower's remark. Immediately after the last two speakers had concluded their remarks, an overwhelming majority of the approximately 7,000 assembled employees voted to authorize a strike when the local's officers and negotiating team "deemed it necessary."

On December 22, 1978, the decision in *Newport News Shipbuilding and Dry Dock Company*, 239 NLRB 1028 (1978), issued in which the Board found that the Company had violated Section 8(a)(5) and (1) of the Act by refusing to recognize and bargain with the Union. Thereafter, upon the Company's petition for review and the Board's cross-petition for enforcement of its bargaining order in that same case, the United States Court of Appeals for the Fourth Circuit, on March 2, remanded the case to the Board for reconsideration of the validity of the Union's certification.[5]

[2] *Newport News Shipbuilding and Dry Dock Company*, 239 NLRB 82 (1978).

[3] Unless otherwise stated, all dates referred to henceforth occurred in 1979.

[4] All transcript references to "Gerald Hardy" are corrected to read "Joe Will Hardy," as reflected in Respondent's brief.

[5] *Newport News Shipbuilding and Dry Dock Co.* v. *N.L.R.B.*, 594 F.2d 8 (4th Cir. 1979).

On June 26, after complying with the remand, the Board issued a supplemental decision reaffirming its earlier bargaining order. *Newport News Shipbuilding and Dry Dock Company*, 243 NLRB 99, 100 (1979). On September 12, the United States Court of Appeals for the Fourth Circuit enforced the Board's order requiring the Company to recognize and bargain with the Union for the employees in the certified unit. *Newport News Shipbuilding and Dry Dock Company* v. *N.L.R.B.*, 608 F.2d 108, 114 (4th Cir. 1979).

In mid-January, Local Union 8888 distributed a handbill to the unit employees announcing that Local 8888's officers and negotiating committee had selected January 31 as the strike date in response to the Company's continuing refusal to recognize and bargain with the Union.

On January 31, in excess of 13,000 company employees walked out in response to Local 8888's call for a strike. The strike ended on April 23. During the strike, employees carried picket signs reading "USWA AFL-CIO-CLC Local 8888 Unfair Labor Strike."

The General Counsel contends that the strike described above was an unfair labor practice strike on the ground that it was caused and prolonged by the Company's refusal to recognize and bargain with the Union. In its answers to the complaints, the Company disputes the General Counsel's contention. In agreement with the General Counsel, I find that the strike at the Company's Newport News shipyard which began on January 31 and ended on April 23 was wholly provoked by the Company's refusal to recognize and bargain with the Union. As the Board held that refusal was violative of Section 8(a)(5) and (1) of the Act, I further find that the strike was an unfair labor practice strike. *O & F Machine Products Company*, 239 NLRB 1013, 1020 (1978); *Hedstrom Company, a subsidiary of Brown Group, Inc.*, 235 NLRB 1198, fn. 2 (1978).

C. *The Alleged Discrimination*

Sections 7 and 13 of the Act guarantee employees the right to strike, to picket, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.[6] Consistent with this statutory design, where, as here, strikers are engaged in an unfair labor practice strike, they are generally entitled to reinstatement upon unconditional application, even if the employer has replaced them. *Mastro Plastics Corp., et al.* v. *N.L.R.B.*, 350 U.S. 270, 278 (1956).

However, where the General Counsel has established that an employer refused to reinstate unfair labor practice strikers upon their unconditional request because of strike misconduct, or has discharged them because of strike misconduct and contends that such refusal or discharge violated Section 8(a)(3) and (1) of the Act, the employer has the burden of showing that it had an "honest belief" that the strikers engaged in strike misconduct so serious as to render them unfit for further employment with the employer. *Giddings & Lewis, Inc.*, 240 NLRB 441, 447-448 (1979); *Rubin Bros. Footwear, Inc.*, 99 NLRB 610-611 (1952).

In establishing its "honest belief" that an unfair labor practice striker engaged in misconduct sufficient to warrant a denial of reinstatement, an employer may base its belief upon plant security reports and other written reports. *Moore Business Forms, Inc.*, 224 NLRB 393, 397 (1976), enfd. in part 574 F.2d 835 (5th Cir. 1978). However, an employer may not rely upon only a showing of the general violence and destructive activity of the strikers as a group, but must instead, rely on the specific misconduct of the particular striker who suffered discharge, denial of reinstatement, or suspension. *Bromine Division, Drug Research, Inc.*, 233 NLRB 253, 260 (1977); *Coronet Casuals, Inc.*, 207 NLRB 304, 305 (1973); *Hendon & Company, Inc.*, 197 NLRB 813, 819 (1972); *Giddings & Lewis, Inc., supra* at 441-447; *Rubin Bros. Footwear, Inc.*, 99 NLRB at 610-611.

Assuming that the employer has established that it suspended, refused to reinstate, or discharge employees because it had an honest belief that the employees engaged in strike misconduct so serious as to deprive them of the Act's protection, the employer will escape liability under the Act, unless it is shown either that the employees terminated or suspended did not engage in the asserted misconduct, or that the misconduct was not serious enough to warrant suspension, discharge, or denial of reinstatement, *Giddings & Lewis, Inc., supra* at 447-448. The employer's defense will succeed if it is shown that the misconduct occurred and was serious enough to warrant discharge or refusal to reinstate. *Gold Kist, Inc.*, 245 NLRB 1095, 1097 (1979).

The General Counsel urges application of the principles established in *N.L.R.B.* v. *Thayer Company and H. N. Thayer*, 213 F.2d 748, 753 (1st Cir. 1954). In *Bromine Division, Drug Research, Inc., supra*, 233 NLRB at 259, Administrative Law Judge Bernard Ries stated and explained that principle as follows:

> While misconduct by unfair labor practice strikers may bar them from reinstatement, "where collective action is precipitated by an unfair labor practice, a finding that action is not protected under § 7 does not, *ipso facto*, preclude an order reinstating employees who have been discharged because of their participation in the unprotected activity." *N.L.R.B.* v. *Thayer Company and H. N. Thayer*, 213 F.2d 748, 753 (C.A. 1, 1954). In evaluating the propriety of reinstatement in such circumstances, "the Board must consider both the seriousness of the employer's unlawful acts and the seriousness of the employees' misconduct in determining whether reinstatement would effectuate the policies of the Act." *Local 833, UAW-AFL-CIO, International Union, United Automobile, Aircraft & Agricultural Implement Workers of America* v. *N.L.R.B.*, 300 F.2d 699, 702-703 (C.A.D.C., 1962).

Here, the Company's unlawful refusal to recognize and bargain with the Union was the sole cause of the unfair labor practice strike. From my reading of the Board and

[6] Sec. 7 provides that employees:

> . . . shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. . . .

Sec. 13 provides that:

> Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike. . . .

court decisions concerning the Company's prior violations of Section 8(a)(5) and (1), I note that the Company based its refusal upon an objection affecting the outcome of the election.[7] Thus, the violation which provoked the strike was an attempt to test in a court of appeals the Board's determination that the Union had won a valid election. Although that test resulted in a determination that the Company's refusal to recognize and bargain was an unfair labor practice, that unlawful conduct was not "so blatant that [it] provoked employees to resort to unprotected action." *Local 833, UAW-AFL-CIO, International Union United Automobile, Aircraft & Agricultural Implement Workers of America* v. *N.L.R.B., supra*, 300 F.2d at 702–703. Accord: *Bromine Division, Drug Research, supra*, 233 NLRB at 259.

In judging each unfair labor practice striker's eligibility for reinstatement or continued employment, I shall be guided by Board policy as stated in *Coronet Casuals, Inc.*, 207 NLRB 304, 305 (1973), as follows:

> In deference to the rights of employers and the public, the Board and the courts have acknowledged that serious acts of misconduct which occur in the course of a strike may disqualify a striker from the protection of the Act. Thus, strikers have been deemed to lose the Act's protection when they seized the employer's property, or engaged in acts of "brutal violence" against a nonstriker. At the same time it is true that not every impropriety committed in the course of a strike deprives an employee of the protective mantle of the Act. Thus, absent violence, the Board and the courts have held that a picket is not disqualified from reinstatement despite participation in various incidents of misconduct which include using obscene language, making abusive threats against nonstrikers, engaging in minor scuffles and disorderly arguments, momentarily blocking cars by mass picketing, and engaging in other minor incidents of misconduct. Consistent with these cases, the Board and the courts have long held that minor acts of misconduct must have been in the contemplation of Congress when it provided for the right to strike and that this right would be unduly jeopardized if any misconduct, without regard for the seriousness of the act, would deprive the employee of the protective mantle of the Act.

At the hearing before me, the Company was careful to explain the grounds it selected for suspending and discharging former strikers who sought reinstatement. D. Tom Savas, the Company's senior vice president for corporate relations, who discharged all of the alleged discriminatees in the instant case and whom I credit, testified as follows upon direct examination by company counsel:

> Q. Mr. Savas, on what basis did you discharge the employees who engaged in strike misconduct?
>
> A. Anybody who was convicted in the District Court for obstructing, harassing, intimidating, hitting, bumping, any employee trying to go to work I discharged them.
>
> Q. Were these employees convicted of conduct—let me withdraw that. What types of criminal charges were these employees convicted of?
>
> A. They were convicted for tire slashing, hitting people trying to go to work, threatening people going to work, blocking people from going to work, threatening and abusive language to the people as to what they would do to them.
>
> Q. Are these examples of what people were convicted of?
>
> A. Yes.
>
> Q. What was the general procedure which you used in discharging the employees who were convicted in District Court?
>
> A. Initially they were suspended and based on evidence supplied to me by investigators and then when they were convicted, I sent them a letter discharging them.
>
> Q. And you used that general procedure for all employees who were arrested?
>
> A. Yes and there were people that were arrested and convicted that were not harassing, intimidating, blocking or hitting employees going to work, those I did not discharge.
>
> Q. How did you obtain the information on which to base your decision to discharge employees?
>
> A. From our documents, by our investigation department.

The "documents" referred to by Vice President Savas are memoranda received in evidence as General Counsel's Exhibit 62. As he relied exclusively upon those documents, I shall look to them in assessing the Company's conduct.

In addition to the memoranda considered by Vice President Savas, the Company, in the course of the strike, received reports of approximately 1,650 incidents of alleged misconduct by strikers against nonstrikers. These reports included assaults on employees attempting to cross the Union's picket line, damages inflicted upon nonstrikers' vehicles, and threats against nonstrikers. There were also reports of arson involving the throwing of firebombs at homes and automobiles, the brandishing of firearms, and threats to use firearms. In one nighttime incident, unknown assailants driving past the home of a nonstriker, as he, his wife, and child slept, fired a shotgun blast which penetrated the home causing damage but no casualties.

One of the more common disorders along the perimeter of the Company's facilities was the spreading of nails, tacks, and devices made of two or more nails on streets and vehicle entrances for the purpose of damaging tires. Despite company efforts to remove the nails, tacks, and multinail devices known as bobjacks or jackrocks, these items were found in the roadway in large numbers throughout the strike. During the strike, the Company repaired a large number of tires apparently flattened by pointed objects cast in their way.

Against this backdrop and with due regard for the principles set forth above, I now turn to the issues presented in this case. I shall determine in each of the 27 alleged instances of discrimination whether Vice Presi-

[7] *Newport News Shipbuilding and Dry Dock Company* v. *N.L.R.B.*, 594 F.2d 8, 12 (4th Cir. 1979); *Newport News Shipbuilding and Dry Dock Company*, 243 NLRB 99 (1979).

dent Savas' decision to discharge, suspend, or deny reinstatement was warranted under the Act.

Johnny H. Bradley

Employee Johnny H. Bradley participated in the strike from January 31 until it terminated on April 23. The Company suspended Bradley from April 23 until May 17, when, pursuant to the Company's letter of May 8, he returned to his former employment as a sandblaster at the shipyard. However, on the very day of his return, the Company terminated him for engaging in strike misconduct. On January 16, 1980, the Company reinstated Bradley.

Savas based his decision to terminate Bradley on a company memorandum. The memorandum reported that the police had arrested Bradley on March 23 for violation of Virginia's right-to-work statute and for possession of marijuana; that on the date of the arrest, while on picket duty at the Company's 50th Street gate, Bradley "walked deliberately" into an employee who was attempting to cross the picket line; and that "Mr. Bradley made a couple of steps out of his regular path to bump into the worker that was crossing the picket line." The memorandum asserted that on the same day, the police found marijuana on Bradley's person during a search. The memorandum also stated that a court had dismissed the alleged right-to-work violation, but that Bradley had been convicted of unlawful possession of marijuana.

Savas also had before him a second report showing that on March 13, while on the picket line, Bradley had been arrested for breach of the peace, and was later convicted of that offense. Particularly, the report showed that Bradley, while walking the picket line, had called Newport News Police Sergeant Wescott "Pissy-Ass Tenneco Faggys."

At the hearing, the Company called Police Sergeant Wescott and Virginia State Trooper Stanley W. Guess to testify about these incidents. Wescott testified that on two occasions on March 13, Bradley called him a "Tenneco Faggot" and a "god damn piss ant." In his testimony before me, Bradley denied making the remarks. However, as Bradley appeared to be a reluctant witness on cross-examination and as Wescott impressed me as a more candid witness, I have credited Sergeant Wescott's testimony.

Bradley's testimony regarding his alleged picket line encounter with a nonstriker conflicts with Trooper Guess' version. Bradley testified that he merely brushed an employee who was attempting to cross the 50th Street picket line on March 23. Virginia State Trooper Guess, who was present on that occasion, testified credibly that the collision between Bradley and the employee was more than a brush. Guess testified: "The collision jarred the worker, however [sic] he continued on his way." At that point, Guess arrested Bradley for violating Virginia's right-to-work law.

Unlike Bradley, who, on cross-examination, seemed less than anxious to answer counsel's questions, Trooper Guess impressed me as a conscientious witness anxious to give his best recollection. Accordingly, I have credited Guess.

Vice President Savas departed from his stated standard when he decided to terminate Johnny Bradley for picket line misconduct. For neither of the memoranda reported Bradley's conviction in a district court, or any court, for obstructing, harassing, intimidating, hitting, or bumping any employee attempting to go to work. Instead, the memoranda showed that the right-to-work allegation was dismissed by the district court, but that Bradley was found guilty of possession of marijuana and a breach of the peace growing out of his encounter with Sergeant Wescott.

In any event, Savas' decision ran afoul of the Act. That Bradley while walking a picket line on March 23, deliberately bumped into a nonstriking employee was not adequate ground for termination. There was no showing that the nonstriking employee was injured or that he was unable to proceed toward his destination. Further, the bumping was not accompanied by any threat or other language a nonstriking employee might construe as a warning to remain away from the Company's premises. Thus, I find that the bumping incident was trivial in nature. *Superior National Bank & Trust Company*, 246 NLRB 721, 724 (1979).

Nor did Bradley's remaining offenses assist the Company's cause. For, while I do not condone either the intemperate language addressed to Sergeant Wescott or the possession of marijuana, neither offense carried the threat of harm to any person or property. Thus, neither offense provided any ground for disqualifying Bradley from his right to continued employment at the Company's shipyard. In sum, I find that none of the misconduct attributed to Bradley by the Company, even if taken together, warranted termination. I therefore conclude that the suspension and discharge of employee Johnny Bradley violated Section 8(a)(3) and (1) of the Act. *Associated Grocers of New England*, 227 NLRB 1200, 1207 (1977), enfd. in part 562 F.2d 1333 (1st Cir. 1977).

Orvel L. Chambers

Employee Orvel L. Chambers participated in the strike and walked the picket line for the better part of February and March. In April, after the strike had ended, Chambers sought reinstatement. When he arrived at the shipyard, the Company took away his badge and told him that it would let him know when to return to work.

By letter of April 30, the Company notified Chambers that it was investigating his strike misconduct and would notify him of what, if any, discipline it would take against him. By a second letter, dated May 4, the Company notified Chambers that he was terminated effective April 23. The Company reinstated Chambers on January 16, 1980.

Vice President Savas based his decision to terminate Orvel Chambers upon a memorandum which showed:

> Violation of RTW LAW-3/15/79-While on picket line said, 'Smile so I can take that shit off your teeth.'—50th & Washington.

The report also showed that the district court found him guilty of the alleged offense but that he was acquitted on appeal.

There is a conflict in the testimony concerning the quoted report. Newport News Police Officer Wayne Smith testified that on March 15, he observed Chambers, while walking a circular picket line and carrying a sign,

intercept an employee attempting to cross the picket line. Chambers stopped, looked at the employee, and told him: "Smile so I can wipe the shit off your teeth." According to Officer Smith, Chambers "did this in a boisterous type manner." At that point, Smith arrested Chambers. On direct examination, Chambers admitted that he told the employee: "Smile so we can see the shit on your teeth." On cross-examination, Chambers admitted that in his pretrial statement, given to a Board investigator, he had admitted telling the employee: "Smile so I can see the shit on your teeth." However, as Smith appeared to be more certain of his testimony, I have credited his version, which was substantially equivalent to that provided in the memorandum confronting Savas when he decided to terminate Orvel Chambers.

Beyond doubt, Chambers' unsavory remark to the nonstriker was misconduct. However, this verbal abuse was not accompanied by any physical action which might instill fear of harm in the nonstriking employee. Nor was there any showing that Chambers attempted to impede the employee's progress through the picket line and into the plant. Indeed, Officer Smith testified that the employee went through the picket line and into the plant after Chambers made his unseemly remark. Further, there is no showing that the other pickets joined in a chorus supporting Chambers' comment.

Chambers' misconduct was trivial and thus insufficient to warrant termination. I find therefore that by terminating Chambers, effective April 23 because of that misconduct, the Company violated Section 8(a)(3) and (1) of the Act. *Coronet Casuals, Inc.*, 207 NLRB at 306.

Deborah Clark and Cecil Ward

Employee Deborah Clark supported the strike and picketed during February, March, and early April. On April 16, Clark sought reinstatement but was not recalled until May 17. However, on May 24, the Company discharged Clark and has not reinstated her to date.

Employee Cecil Ward was a gate captain throughout the strike. After the strike's termination on April 23, Ward sought reinstatement.

By letter of April 27, the Company notified Ward that he was under investigation for strike misconduct. The Company reinstated Ward on May 17. However, on May 24, the Company terminated Ward for strike misconduct.

At the time Savas decided to terminate employees Clark and Ward, he had before him memoranda charging each of the employees with "Littering the street with tacks." The memoranda also showed that the two employees were found guilty in district court. The evidence recited in each memoranda was the same and was as follows:

> Officer Fortner testified that on March 29, 1979, at approximately 7:50 p.m. he was traveling north on the 7100 Block of River Road when he observed a brown Cordoba traveling south on River Road. The Cordoba was at a stand-still in the middle of the Road [sic]. Officer Fortner stopped paralled [sic] to the brown Cordoba which was occupied by Mr. Ward and Deborah M. Clark. He, then, observed several Bob-Jacks [sic] in the middle of the north bound [sic] land [sic] of River Road. Officer Fortner proceeded to pick these Bob-Jacks [sic] out of the street, and he retrieved six. He then radioed for a unit to stop the brown Cordoba in question. And [sic] Officer [sic] proceeded south on Huntington Avenue behind the brown Cordoba occupied by Cecil Ward and Deborah Clark and stopped them in the 300 block of 56th Street. After questioning both subjects, a coffee can was taken from between the legs of Ms. Deborah Clark who was a passenger in the car. The can contained seventy-two Bob-Jacks [sic]. At this time, both parties were arrested and charged with littering the street with tacks.

On May 23, both Deborah Clark and Cecil Ward were found guilty of the charged offense by a general district court. On appeal, neither conviction was sustained.

In an effort to rebut the evidence of misconduct presented in the Company's memoranda, the General Counsel offered Clark's and Ward's testimony. Ward denied that either he or Clark had thrown bobjacks along River Road on the evening of March 29. Ward also denied knowing at the time of his encounter with the police that night that a can of bobjacks was in the front of his car.

Clark was not given an opportunity to deny throwing bobjacks on River Road on the evening of March 29. However, Clark's testimony shows that when confronted by the police on the night of March 29, she denied throwing bobjacks. Clark's testimony also shows that after she got into the Cordoba that night she became aware of a can of bobjacks on the floor.

In response to the General Counsel's effort, the Company introduced testimony of former Newport News Policeman James Fortner, Newport News Policeman C. S. Morgan, and August 0. Hoppe, a firearms and toolmark identification expert employed by the Commonwealth of Virginia. Fortner's testimony was that on the evening of March 29, he and another officer, while on a routine patrol along River Road, in the vicinity of the Company's shipyard, noticed a brown Cordoba which had stopped in the southbound lane of River Road "for no apparent reason." Approximately 120 feet from the location of the Cordoba, Officer Fortner got out of the patrol car and began a search in which he found bobjacks on the pavement. One of the bobjacks was approximately 120 feet north of the Cordoba. The remaining bobjacks were strewn in a 300-foot area over 120 feet north of the Cordoba. Officer Fortner, by radio, requested his colleague, C. S. Morgan, to stop the Cordoba.

Morgan spotted the vehicle and stopped it. When Morgan approached Ward and asked about bobjacks, Ward answered that he did not have any and did not know what Morgan was talking about. However, Morgan noticed a coffee can on the floor, near Clark. When Morgan asked Ward what was in it, Ward said, "Some papers." When Morgan insisted upon looking at the can's contents, Ward handed it to him. Morgan looked in and found that it was half full of bobjacks. Thus, Morgan's and Fortner's credited testimony shows beyond question that on the evening of March 29, there were bobjacks in the Cordoba driven by Ward, in which Clark was a passenger.

I also find from the credited testimony of August 0. Hoppe and Officer Morgan that Hoppe concluded, after examining the bobjacks found in the Cordoba and those picked up on River Road by Officer Fortner on the

night of March 29, that all bore markings indicating that the same machinery made both groups of bobjacks.

From the foregoing, I find that the memoranda reporting Clark's and Ward's misconduct provided Vice President Savas with adequate evidence to justify his belief that they had dropped bobjacks on River Road on the night of March 29. Further, the General Counsel did not sustain his burden of showing that Clark and Ward did not in fact engage in the asserted misconduct. Indeed, the circumstantial evidence presented by the Company regarding the identity of the bobjacks pursuaded me to reject Ward's denial.

I am also conscious of the seriousness of Clark's and Ward's misconduct. Throughout the strike, the presence of bobjacks on the roadways near the Company's shipyard was a major source of damage to the tires on automobiles driven by nonstriking employees. In light of the General Counsel's failure to sustain his burden of proof, I find that the suspensions and terminations of Clark and Ward for misconduct did not run afoul of Section 8(a)(3) and (1) of the Act. I shall therefore recommend dismissal of the complaint allegations concerned with Deborah Clark's and Cecil Ward's suspensions and terminations.

Charles Cox

Employee Charles Cox participated in the strike from its inception until it was terminated in April. Cox walked the picket line at the Company's 41st Street gate beginning in the latter part of February. When the strike ended, Cox sought reinstatement by reporting to the Company's employment office. By letter dated April 30, the Company notified Cox that he was under investigation for possible disciplinary action growing out of alleged misconduct during the strike. Thereafter, by letter dated May 8, the Company invited Cox back to work pending the outcome of the investigation. Cox returned to work on May 17, and continued in his job until June 16, when he was terminated for strike misconduct. Since his termination, the Company has not offered Cox reinstatement.

The memorandum dated June 11, to which Savas referred when he decided to terminate Cox, reported that Cox had been convicted of three counts of using abusive language and had been fined $75 on each count. It also showed that the complainants were employees Buford Back, Lonney Nunemaker, and John Swicegood. The memorandum presented the following evidence:

> Mr. Back stated that he left the building at 41st [sic] to go to the credit union. When he walked to the sidewalk across the street, Mr. Cox that was a lone picketer there called Mr. Back a scabb [sic]. Mr. Back smiled. Mr. Cox then called Mr. Back a White sun-of-a-bitch [sic]. Mr. Back smiled, and then Mr. Cox said to Mr. Back you must like your job. Mr. Back told him that he did. He then told Mr. Back to stick the job up his ass, better still stick it up his wifes [sic] ass. He then stated that Mr. Back had false teeth, and called him a false tooth white sun-of-a-bitch [sic]. He was also called a White [sic] mother fucker. Mr. Back came back later and Mr. Cox attacked Mr. Back and a young woman name [sic] Donna Jenkins. Mr. Cox cursed the woman along with Mr. Back. He told Mr. Back to stick his job up that White [sic] bitch [sic] ass that he was walking with.
>
> Later, Mr. Newmaker [sic] was coming through the gate at 41 st. [sic] and Mr. Cox cursed him and yelled in his ear. Later Mr. Swingood [sic] came the same way and Mr. Cox Yelled [sic] in his ear causing damage to his ear.

The incident referred to in the memorandum regarding Cox occurred on April 18 in the vicinity of the 41st Street gate of the Company's Newport News shipyard.

In his testimony before me, Cox admitted that he called Mr. Back a scab and "a snaggled tooth mother fucker." Further, Cox admitted engaging in "a cussing match" which, he testified, lasted "about 5 minutes." Cox also testified that his language was in response to Back's use of "black bastard" to address Cox. According to Cox, Nunemaker[8] told Cox "to kiss his ass." At another point, according to Cox, Back, while escorting a young woman, made an obscene gesture to Cox and that Cox told him to "shove the finger." On cross-examination, Cox did not have an opportunity to deny that he yelled into employee Swicegood's ear. Buford Back's testimony was substantially in accord with the report which confronted Savas at the time he decided to discharge Cox. Employee Donna Jenkins, who was present at one of the encounters between Back and Cox, corroborated Back's testimony. Employee Nunemaker corroborated Back's testimony regarding Cox's use of obscene language on April 18.

As employees Back, Swicegood, and Nunemaker impressed me as being more conscientious than Cox about presenting details of their encounters with him on April 18, I have credited their testimony.[9] Accordingly, I find that the General Counsel has not shown that Cox did not engage in the misconduct attributed to him by the Company's memorandum.

However, I am not persuaded that Cox's misconduct permanently damaged Swicegood's ear. Swicegood's testimony does not establish that examination or a test revealed a permanent deficiency attributable to Cox's yelling. Swicegood's testimony shows only that he waited 3 or 4 days for the ringing to subside and when it did not do so, consulted a master of audiology, underwent a test, and was told that his hearing "is right on the borderline of being deficient." Absent was any testimony to show the quality of Swicegood's hearing prior to his encounter with Cox on April 18. Nor was such information, or any other medical advice regarding the permanent effect of Cox's conduct upon Swicegood's ear available to Savas on June 13, when he decided to terminate Cox. Absent such medical advice or any other authoritative information linking Swicegood's loss of hearing to Cox's misconduct, the Company did not have an honest belief that

[8] Nunemaker is referred to in the memo to Savas as "Newmaker." John Swicegood is referred to as "Mr. Swingood" in that memo.

[9] Company witness Donna Jenkins appeared greatly embarrassed when asked to testify about the details of Cox's remarks. In an effort to obtain her corroborating testimony, company counsel resorted to leading questions designed to show that her recollection corresponded to that of witness Buford Back. As witness Jenkins appeared to be very uncomfortable while testifying in this regard and appeared to be anxious to quickly accomplish an unpleasant task, I find her testimony to have little corroborative value.

Cox's yelling at Swicegood caused permanent damage to Swicegood's hearing.

In sum, Cox's use of obscene language against Back, Nunemaker, or Jenkins, and his yelling into Swicegood's ear, while Cox was picketing the Company, did not disqualify him from continued employment at the Company's shipyard after the unfair labor practice strike had ended. *Coronet Casuals*, 207 NLRB at 305–307. I therefore find that the Company violated Section 8(a)(3) and (1) of the Act by suspending Cox on April 23, and by terminating him on June 14, because of the misconduct recited in the memorandum to which Savas referred when he made these decisions to punish Cox.

David R. Davis

Employee David R. Davis supported the strike and engaged in picketing at the shipyard throughout its duration. At the end of the strike, Davis sought reinstatement. However, when he reported to the shipyard, the Company advised him that he would be notified about returning to work. By letter of May 4, the Company notified Davis that he was terminated as of April 23, because of strike misconduct. The Company has not offered him reinstatement.

The memorandum upon which Vice President Savas based his decision to terminate Davis reported that this employee had been convicted of a right-to-work law violation at one of the Company's gates. The memorandum provided no details of Davis' misconduct.

I find from the testimony of Virginia State Police Sergeant H. D. Brown that on February 2, while he was on duty at the Company's 50th Street gate, he observed 75 to 80 pickets, including Davis, marching in a circle. Brown was inside the circle of pickets. At approximately 6:50 that morning, Brown observed a worker approaching the picket line. Brown observed Davis turn and put his right shoulder into the worker, who was attempting to pass through the line. Simultaneously, Jones, a second picket, "speeded up" and walked into the employee as he was attempting to proceed to the Company's gate.

Both Jones and Davis testified that Davis called the employee a scab and brushed him with his elbows. Jones also admitted that he, Jones, brushed his chest across the worker. Although I find no reason to discredit Davis' testimony that he brushed the worker with his elbow or to discredit Jones' testimony that it was Davis' right arm which came into contact with the worker, I find it likely that Sergeant Brown believed that it was Davis' shoulder which came in contact with the employee.

I find no merit in the Company's contention that the memorandum upon which Savas relief was adequate to provide Savas with a good-faith belief that Davis had engaged in serious misconduct. For the memo did not provide any details of the incident.

The Board has held that where it is confronted only with evidence that a striker was convicted of an offense committed on the picket line without presentation of the facts supporting that conviction, the Board will not deprive the striker of his or her right to reinstatement. *Bromine Division, Drug Research*, 233 NLRB at 260. An employer is in no better position to evaluate strike misconduct than the Board would be when confronted with only the report of a conviction. Here, the Company's termination decision was made on the sole basis of a reported conviction. That report provided no basis for determining whether Davis' violation was trivial in nature, or so serious as to impair his value as an employee. Accordingly, I find that the Company lacked sufficient information to support an honest belief that Davis had engaged in serious misconduct.

In any event, crediting Sergeant Brown's testimony, I find that Davis' misconduct consisting of elbowing a nonstriker was not sufficiently serious to deprive him of reinstatement. There is no showing that the employee suffered any injury or was barred from completing his journey to the shipyard. In short, I conclude that Davis' brief and isolated encounter with a nonstriker at the Company's 50th Street gate on February 2, was too trivial to deprive him of the Act's protection. Accordingly, I find that by terminating Davis, the Company violated Section 8(a)(3) and (1) of the Act. *Superior National Bank & Trust Company*, 246 NLRB 721, 724 (1979).

Earl Evans

Employee Earl Evans participated in the strike and was a picket from January 31 to April 23. At the strike's termination, Evans successfully sought reinstatement. By letter of May 4, the Company notified Evans of his termination as of April 23 for strike misconduct. The Company has not reinstated Evans.

The memorandum referred to by Savas when he terminated Evans, reported, *inter alia*, that Evans had been convicted of violating Virginia's right-to-work law on February 2. The memorandum provided the following details regarding Evans' misconduct: "Interfering with workers trying to enter the yard for work.—Shouldering a worker crossing a picket line."

An eyewitness to the incident was Newport News Police Captain John W. Saunders, who was stationed near the Company's 37th Street gate, on the afternoon of February 2. Saunders observed a picket line walking in front of the pedestrian gate. Saunders saw a man leave the shipyard and come through the picket line toward employee Evans. When the man came within a few feet of Evans, Evans stopped and hit the man with his left shoulder. However, the man continued on his course without further interference from Evans. Evans and the man did not exchange any words. Nor was there further physical contact between the two.[10]

The memorandum Vice President Savas read when he decided to terminate Evans did not provide adequate

[10] My findings are based upon Saunders' testimony. Saunders impressed me as a candid witness, giving his best recollection regarding his observations.

Earl Evans testified that his shoulder came in contact with the man crossing the picket line because the man changed his course and brushed passed Evans. However, Evans' testimony on cross-examination regarding this incident persuaded me that he was not a reliable witness. Thus, on cross-examination, Evans first denied testifying at a state unemployment compensation hearing that he, Evans, had shouldered the man as he began to cross the picket line in front of him. When pressed further by counsel as to whether he had said it, Evans answered, "I shouldn't have worded it that way." When I asked him if he had testified as counsel suggested, Evans responded: "I don't remember, sir."

General Counsel's rebuttal witness Winkler, who seemed uncertain, testified that he was unaware of any contact between Evans and the man crossing the picket line. Winkler contradicted both Evans' and Saunders' testimony. My confidence in Saunders' testimony persuaded me to reject Winkler's testimony on this point.

basis for such drastic punishment. Shouldering a nonstriker as he passed through the picket line on his way from the shipyard is not enough to warrant the termination of an unfair labor practice striker. There was no showing that Evans' isolated encounter resulted in injury or caused the nonstriker to be diverted from his intended path across Washington Avenue. I find therefore that by terminating Evans, the Company violated Section 8(a)(3) and (1) of the Act. *Star Meat Company*, 237 NLRB 908, 909 (1978).

Wayne Fisers

Employee Wayne Fisers joined the strike at its inception and picketed the shipyard for about 3 or 4 weeks. In mid-March, Fisers abandoned the strike and returned to work. On April 23, after the Union had terminated the strike, the Company notified Fisers that he was suspended pending investigation of his alleged strike misconduct. By letter of April 27, the Company notified Fisers that he was terminated effective April 23, because of his strike misconduct.

Vice President Savas based his decision to terminate Wayne Fisers upon a memorandum which reported Fisers' misconduct as "Concealed weapon (knife)." The report also indicates that Fisers' misconduct occurred at 8:30 a.m. on February 6, and that on March 8, he was fined $75 for this offense.

The facts regarding Fisers' misconduct are undisputed. At about 8 o'clock on the morning of February 6, Sergeant Brown of the Newport News police department observed Fisers, on the picket line, wearing a sheathed hunting knife on his belt. Sometime later, Sergeant Brown noted that Fisers who was still on the picket line had donned a coat which covered the knife.

Brown, together with Officer McKeoun, approached Fisers and asked him what had happened to the knife. Fisers raised his coat revealing the sheathed knife on his belt. At that point, Sergeant Brown, in the presence of McKeoun, arrested Fisers for carrying a concealed weapon. The hunting knife consisted of a blade approximately 4 inches in length and a handle approximately 3 inches in length. At all times, while Fisers was on the picket line, on the morning of February 6, the knife blade remained sheathed and attached to his belt.

The presence of a sheathed knife on Fisers' belt, as he walked the picket line, was not likely to cause fear among nonstrikers who might have observed it as they proceeded to or from the shipyard. Fisers did not draw attention to the knife by withdrawing it from its sheath. Nor did he brandish the knife so as to suggest a willingness to use the weapon against nonstrikers. Further, when he covered it with a coat, Fisers negated any suggestion of an intent to use the knife as a means of persuading nonstrikers to support the strike. In short, I find that the presence of a sheathed hunting knife on Fisers' belt, as he walked the picket line, was insufficient evidence of misconduct to justify his termination. Accordingly, I find that by terminating Fisers effective April 23, the Company violated Section 8(a)(3) and (1) of the Act.

James A. Fountain

Employee James Fountain participated in the entire strike, during which he walked a picket line. After the strike ended, Fountain sought reinstatement. The Company advised him that it would notify him when to report for work.

By letter of May 8, the Company invited Fountain to report to work no later than May 17. Fountain returned to work on that date and remained employed at the shipyard until June 29. On the latter date, the Company terminated Fountain for picket line misconduct.

Savas made his decision to discharge Fountain after consulting a memorandum showing that early on the afternoon of March 9, Fountain was arrested for violating the State's right-to-work law at the Company's 37th Street and Washington Avenue gate. The evidence set forth in the memorandum is as follows:

> Officer Roth stated that while he was working strike duty at the walk-in gate at 37th & Wash. about 12:25 P.M. on March 9, 1979, he saw a shipyard worker approaching the gate to enter. When he got near to Mr. James Fountain, Mr. Fountain told him that, "Wait until you come out tonight, I'm going to find you and beat you up." The worker didn't say anything to Mr. Fountain, and went on in the gate to work.

The memo also stated that Fountain had been found guilty of the alleged offense.

By letter of January 8, 1980, the Company announced to Fountain that his discharge was converted to a suspension without pay from June 29 until he returned to work. The letter went on to invite Fountain to return to work no later than January 16. Fountain returned to work at the Company's shipyard on January 16, 1980.

Officer Roth's credited testimony essentially repeated the contents of the memorandum with some additional details. I find from his testimony that on March 9, at the Company's 37th Street gate, at 12:25 p.m., Roth arrested employee Fountain and charged him with violation of the State's right-to-work law. Roth made the arrest after he heard Fountain tell a nonstriking employee, who was entering the shipyard: "That's all right. Wait till tonight, I'll find you and beat you up." The employee continued on his way, without hesitation or response.[11]

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[11] Fountain's testimony regarding his conduct on March 9 differed substantially from that of Officer Roth. However, unlike Officer Roth, who was a candid witness and seemed to have no doubt about what happened, Fountain could not remember in which criminal trial he had testified, seemed listless as he testified, and gratuitously protested that he could not "remember word for word."

According to Foundtain's testimony on direct examination, he noticed that the employee had money clipped onto his identification badge, warned the employee to put the money in his pocketbook, and added "Somebody might take it. . . .!" Later on cross-examination, Fountain quickly admitted that in a pretrial affidavit given to a Board agent, he had admitted telling the worker "to put his money in his pocket before the boys beat him up." Fountain's admission fostered my suspicion that he was less than a candid witness at the hearing.

Employee Julio Rodriguez testified that Fountain told the employee "You'd better put your money away before someone takes it away from you." However, Fountain's admission in his pretrial affidavit cast serious doubt on the accuracy of Rodriguez' testimony. That Rodriguez was a company employee when he testified before me, did not reassure me that his memory at the hearing was more reliable than Fountain's memory when he gave a pretrial affidavit. Accordingly, I have rejected Fountain's and Rodriguez' testimony regarding Fountain's alleged misconduct on March 9.

The evidence contained in the memorandum upon which Savas relied, and in the testimony of Officer Roth, presented insufficient ground for suspending and later, terminating Fountain for strike misconduct. All that was shown both in the memorandum and the police officer's testimony was that Fountain issued a threat of deferred physical harm, conditioned upon finding the intended victim hours later. There was no evidence that Fountain committed any violence upon nonstriking employees or had been party to such acts of violence at any time during the approximately 2-1/2 months of the unfair labor practice strike in which he participated. I therefore conclude that the Company's decision to suspend Fountain from April 23 until May 16, and its later decision to terminate him on June 29, violated Section 8(a)(3) and (1) of the Act. *Mosher Steel Conpany*, 226 NLRB 1163, 1168-69 (1976).

Joe Will Hardy[12]

Employee Joe Will Hardy participated in the entire strike and picketed the shipyard.

At the strike's conclusion, when Hardy sought reinstatement, the Company advised him that he would be contacted later regarding reinstatement. By letter of April 27, the Company notified Hardy that he was terminated effective April 23, because of strike misconduct. The Company has not offered to reinstate Hardy.

The memorandum upon which Vice President Savas based Hardy's termination reported that Hardy had been charged and found guilty on two counts of brandishing a firearm. The memorandum also recited the following details:

> Hardy pulled up by Duke's Truck [sic] in front of Nick Allen Buick and displayed a firearm—the same with Parks at Mercury & River Road.

The Company presented the credible testimony of employee James Duke regarding the first incident. At about 4 p.m., on February 5, after Duke had departed the shipyard in his pickup truck, and was heading north, along nearby Warwick Boulevard, one of the passengers in the back of the pickup truck reported: "[T]here's a guy behind us with a gun." Duke slowed to look. He noticed a maroon and white Monte Carlo Chevrolet following near the rear or his truck. Soon the Monte Carlo came close to the cab of Duke's pickup truck.

Duke saw a chrome-plated revolver lying on the Monte Carlo's dashboard near the steering wheel. The man in the automobile patted the revolver and pointed his finger at Hardy. The man also gave Duke "the bird sign" and again patted the revolver.

Duke's fear caused him to pull away from the Monte Carlo. However, the Monte Carlo pulled up in front of Duke and attempted to cut him off. As the two vehicles approached an off ramp going up to Mercury Boulevard, Duke made a right turn. At this, the Monte Carlo came close to the pickup truck's path and ran up on the side of an embankment. Duke continued on Mercury Boulevard and was no longer troubled by it.

Following this incident, Duke checked the Monte Carlo's license tag number and found out that it was registered to Joe Will Hardy, the alleged discriminatee. Duke quickly swore out a warrant charging Hardy with brandishing a firearm.

I find from the testimony of employee Jack Drew that as the Monte Carlo closed on Duke's pickup truck, in which Drew was a passenger, Drew obsererved Hardy pull out a pistol and lay it on his dashboard. Drew also observed Hardy point to the pistol, lay his hand on it, and make gestures with a piece of paper suggesting that he was recording the truck's license tag number. In all, Hardy trailed the pickup truck for 10 minutes before he drove abreast of the driver's window and showed the pistol to Duke.

I also find from the testimony of company employees Larry Parks and Larry Palin that there was a second incident on February 5, involving Joe Will Hardy. At approximately 4 p.m. that day, Parks, driving a van carrying eight other nonstriking employees, left the shipyard. As Parks was waiting to make a left turn onto the approach for the James River Bridge, Hardy, driving his Monte Carlo stopped beside the van and told Parks and his passengers, in substance, to keep out of the Company's shipyard. As if to drive home his suggestion, Hardy pushed a pistol resting on the front seat of his auto toward them. The entire incident took approximately 5 minutes. Parks obtained Hardy's license tag number and swore out a warrant against him.[13]

Hardy's gestures toward the pistol and the employees riding in Duke's and Parks' vehicles were likely to suggest to them a threat of harm if they displeased him. Considering their proximity to the struck shipyard, at the time Hardy confronted them and their status as nonstrikers who had left the shipyards only moments before, it was also likely that the threatened employees concluded that Hardy was a strike supporter displeased by their apparent refusal to join the strike. In sum, Hardy's action suggested a willingness to use the weapon against nonstriking employees. His action was therefore likely to have a strong coercive effect upon the potential victims riding with Duke and Parks. I find, therefore, that Hardy, by calling attention to his pistol in these circumstances, threatened harm to nonstriking employees. *Routh Packing Company, Inc.*, 247 NLRB 274, 279 (1980).

I also find that the report contained in the memorandum which Savas used in making his decision to termi-

[12] The transcript incorrectly shows Hardy's given name as "Gerald." Company correspondence and other exhibits showed his full name to be "Joe Will Hardy."

[13] Hardy's testimony regarding his conduct on February 5 differs substantially from that offered by company witnesses James Duke, Jack Drew, Larry Parks, and Larry Palin. However, I have rejected Hardy's testimony because of my impression that he was a reluctant witness. Thus, when asked what was in his automobile on the afternoon of February 5, he shied away from details. Instead, he answered first that it was junk, and later that it was trash. At another point on cross-examination by the Company's counsel, Hardy responded, "None of your business." Further, Hardy, though given an opportunity to do so, did not provide a plausible explanation of why he exhibited a pistol as he drove along with the nonstrikers who had just left the shipyard. His response, i.e., that he exhibited the pistol to avoid being caught with a concealed weapon, does not meet the question's expectations and suggest evasion. Unlike Hardy, company employees Duke, Drew, Parks, and Palin impressed me as candid witnesses, anxious to give their best recollections. Accordingly, I have not credited Hardy's testimony where it contradicted or was inconsistent with their credited testimony.

nate Hardy was sufficiently detailed to sustain an honest belief that Hardy had engaged in serious misconduct. For in addition to reporting Hardy's conviction for brandishing a firearm on two occasions, the memorandum told of Hardy's display of a firearm to named individuals near the strike scene. Savas could easily have identified these individuals as nonstriking employees either from personal knowledge or from the Company's records. However, even without this information, the memorandum alone portrayed serious misconduct by an employee in the vicinity of the struck shipyard. Finally, the General Counsel has not shown Hardy to be innocent of the strike misconduct charged to him by the Company. Accordingly, I find that Hardy's misconduct on February 5 was sufficiently serious to permit the Company to discharge him lawfully. I shall therefore recommend dismissal of the allegation that Hardy's termination was violative of Section 8(a)(3) and (1) of the Act.

Brad N. Harrison

Employee Brad N. Harrison joined the strike at its inception and for its duration was the Union's assistant gate captain at the Company's 50th Street gate. After the strike ended, Harrison sought reinstatement. The Company terminated Brad N. Harrison effective April 23, on the ground that he engaged in strike misconduct.

At the time he decided to discharge Harrison, Vice President Savas consulted two memoranda. The first memorandum[14] reported that on March 6, Officer Dorner had observed Harrison "throw tacks in the street at the entrance of the 37th St. Gate," and that because of this conduct Harrison had been charged and found "GUILTY."

The second memorandum[15] recites that Harrison was charged with violating the State's right-to-work law at "37th & Washington." This memorandum gave February 4, as the date of the alleged misconduct which is reported as: "Observed throwing tacks in street—Officer Dorner," and reported Harrison's conviction of the alleged right-to-work violation. A third memorandum reports that on April 16, Harrison was charged with unlawful assembly at 38th and Washington. This last notation contained no details of the alleged misconduct.

I find from the testimony of Newport News Police Officer David Dorner that at approximately 10:50 p.m., on February 4, while standing in the driveway entrance of the 37th Street shipyard gate, he observed Harrison, who was one of approximately 25 pickets, drop a flatheaded roofing nail on the driveway. Dorner immediately arrested Harrison for violating Virginia's right-to-work law.

The General Counsel contends that because it was nighttime and because he was wearing riot gear including a hardhat and visor, Dorner's view was impaired so that he could not clearly observe Harrison. However, there was no showing that the helmet or the viser or both of them were likely to impair Dorner's vision. This circumstance together with my impression that Dorner was a candid witness, persuaded me to credit his testimony.[16]

I agree with the General Counsel's contention that the allegation that Harrison engaged in unlawful assembly did not provide the Company with adequate basis for discharging Harrison. The memorandum containing this allegation did not provide any details of the alleged misconduct. Further, the memorandum did not show the disposition of the alleged offense in a local court. I find, therefore, that at the time Savas decided to terminate Harrison, Savas had no basis for an honest belief that Harrison had engaged in misconduct warranting termination.

I agree with the Company that the two memoranda reporting Harrison had thrown tacks in the street at the 37th Street gate on February 4, provided adequate ground for discharging him. For, the Board has consistently held that the scattering of nails by striking employees at the gates of a strikebound plant constitutes misconduct sufficient to warrant discharge. *Giddings & Lewis, Inc.*, 240 NLRB at 441, 451.

Here, the record shows that Harrison's misconduct did not reach the magnitude portrayed by the memoranda. For, I find that Harrison dropped only one roofing nail at the 37th Street gate at a time when there was a quantity of other nails on the same ground.

I find the result in Harrison's case is not governed by the results of the nail scattering in *Giddings & Lewis, Inc.* There, the Board found that striking employee Al Green had scattered nails in a driveway leading to the respondent's strikebound plant and concluded that this misconduct coupled with his earlier misconduct of throwing a rock at a plant window as two members of management looked out "constituted sufficiently egregious conduct such as to warrant his discharge (*Id.* at 451)." Similar results have obtained in cases involving the scattering of quantities of nails at the gates of struck plants. *Moore Business Forms, Inc.*, 224 NLRB 393, 398 (1976), enfd. in part 574 F.2d 835 (5th Cir. 1978); *Otsego Ski Club-Hidden Valley, Inc.*, 217 NLRB 408, 412 (1975); *Jai Lai Cafe, Inc.*, 200 NLRB 1167, 1171 (1973); *Borman's Inc.*, 199 NLRB 1250 (1972). Here, the record shows that Harrison's only strike misconduct occurred when he placed one roofing tack at the entrance to one of the Company's gates. Neither injury nor damage resulted. Indeed, Officer Dorner retrieved the nail when he arrested Harrison. I therefore conclude that contrary to the Company's honest belief, the record shows that Harrison's misconduct was not so egregious as to warrant his discharge. Accordingly, I find that Harrison's termination, effective on April 23, violated Section 8(a)(3) and (1) of the Act.

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[14] See G.C. Exh. 62(K).

[15] See G.C. Exh. 62(LL).

[16] I have not credited Harrison's denial that he had anything to do with tacks or nails, or similar things, prior to his arrest on February 4. Harrison admitted that while on the picket line at the 37th Street gate, he observed an ever-increasing number of roofing nails on the ground. However, he also testified that he had no idea how they had gotten there. I find it difficult to believe that Harrison, as he walked the picket line, did not see someone drop some nails. I also noted Harrison's evasive answer when counsel for the Company asked him whether he "didn't feel a need to find out." These infirmities in Harrison's testimony persuaded me that he was not as reliable a witness as Officer Dorner.

Nor was the testimony of striking employee Dallas Robbins helpful to Harrison's cause. Robbins, who was gate captain at the 37th Street gate was standing on Washington Avenue, across the street from the gate entrance and merely observed two officers conducting Harrison across the avenue following his arrest. Robbins did not see the arrest or any of the circumstances leading up to the arrest.

James P. Justice

Employee James P. Justice was a picket for the strike's duration. At the strike's conclusion, Justice sought reinstatement and was advised that he would be called back to work. By letter of April 30, the Company announced that it was investigating misconduct attributed to Justice which might warrant disciplinary action. By letter of May 8, the Company invited Justice to report back to work by May 17. Justice returned to work on May 10. Seven days later, the Company terminated Justice for strike misconduct. The Company reinstated Justice as of January 16, 1980. The memorandum Savas referred to at the time he decided to discharge James P. Justice, showed that on the early afternoon of March 27, a police captain, Boyd, arrested Justice for violating the State's right-to-work law at the 50th Street gate. The memorandum reported the following details:

> Captain Boyd on the 27th day of March did see while working strike duty at 50th St. Gate [sic], Mr. Justice strike a shipyard worker on the shoulder while coming out of the gate at noon. James P. Justice walked in front of the man that was coming out of the gate, and with his shoulder, he bumped into the worker, after the worker had paused to let Mr. Justice by. He knocked the man back several steps. The Captain then placed him under arrest.

Finally, the memorandum reported that Justice had been convicted of the alleged offense.

At 12:47 p.m., on March 27, Newport News Police Captain Donald Bruce Boyd was stationed at the Company's 50th Street gate, standing inside a circle of 30 to 35 pickets. Boyd observed a nonstriking employee cross the street and approach the picket circle at a right angle. As the nonstriking employee attempted to pass through the pickets' circle, Justice bumped him. I find from Boyd's testimony that Justice thrust his left shoulder into the nonstriking employee, struck the employee's left shoulder, and turned him sideways as he attempted to cross the line. There is no showing that the nonstriking employee suffered injury or was prevented from continuing on his way.[17]

James P. Justice's misconduct either as depicted in the memorandum, or as testified to by Captain Boyd was of little moment. Justice's misuse of his shoulder did not injure the employee or deter him from continuing on his way. Further, there is no showing that James P. Justice was guilty of any other misconduct during the strike. In sum, the evidence available to Vice President Savas regarding James P. Justice's misconduct was insufficient to permit Savas either to suspend Justice or to discharge him. *Superior National Bank & Trust Company*, 246 NLRB at 724; *Star Meat Company*, 237 NLRB at 909. I find therefore, that by suspending James. P. Justice and thereafter discharging him, the Company violated Section 8(a)(3) and (1) of the Act.

[17] In his testimony, Justice admitted that while he was walking on the picket line on March 27, he bumped into a man crossing in front of him. Justice however, did not recall whether he hit the man with his right or left shoulder. Nor did he remember which part of the man's anatomy he struck. In contrast, Captain Boyd apparently enjoyed a better grasp of the details of the incident and appeared to be giving his best recollection. For these reasons, I have accepted Captain Boyd's version of the bumping incident involving James P. Justice.

Jerry L. Justice

Employee Jerry L. Justice supported the entire strike and was a strike coordinator. At the conclusion of the strike, Jerry L. Justice sought reinstatement. By letter of April 30, the Company notified Jerry L. Justice that he was under investigation for strike misconduct. By letter of May 8, the Company offered reinstatement to Jerry L. Justice. He reported to work on May 17. Justice continued to work at the shipyard until June 13, when the Company terminated him for strike misconduct. Since his termination, the Company has not offered reinstatement to Jerry Justice.

Four memoranda reporting strike misconduct confronted Vice President Savas when he decided to discharge Jerry L. Justice. The first memorandum reported that at 11 p.m., on January 31, at the shipyard's 68th Street gate, Jerry L. Justice was arrested and charged with "[d]estroying private property." The evidence set forth in the memorandum was as follows:

> Mr. King stated that while he and two men that work in the shipyard were on their way to work, they entered the shipyard [sic] at 68th St. When he entered he heard something scrape his truck. He could not stop at the time because of the traffic. When he got down in the shipyard, he got out of his truck and checked his truck and found that there had been $177.57 worth of damage to the truck when the picketers attacked the truck at the 68th St. Gate [sic]. He didn't know which one of the picketers did the damaging until he saw the newspaper the next day. The newsman had taken a picture of Mr. Justice when he was doing the damage to his truck. Mr. King got the police dept. to get the name of the man in the picture. Which [sic] turned out to be Mr. Justice. The picture was very clear, Mr. King could identify his truck and the passengers he was riding also. Mr. Justice stated that that was him in the picture.

The report stated that Jerry L. Justice had been found guilty of the offense.

The second memorandum recited that Justice was charged with "Interfering with Police Officer" in an incident which occurred at the shipyard's 68th Street entrance, at 4:30 a.m., on April 2. The memorandum presented the following account of the alleged interference:

> Officer Taylor stated that an arrest had been made at the above location, and Mr. Justice came ovet [sic] to find out what was going on. The arrest was made on another one of the picketers that was on strike at that time. Officer Taylor told Mr. Justice to leave and go back where the rest of the picketers were. But Mr. Justice refused to leave. Officer Taylor told him not to enterferr [sic]. But Mr. Justice continue [sic] to follow the officers asking questions. He was told several time [sic] more, but he didn't pay any attention. He was then placed under arrest.

The memorandum states that this allegation was "Dismissed."

The third report involved an alleged violation of the State's right-to-work law at 12:50 p.m., on April 16, near

the shipyard's 50th Street gate. The arresting officer was Newport News Police Chief C. E. Hinman. The memorandum reported the details of this allegation as follows:

> Chief Hinman stated that he was working strike duty on the above date, and he saw several workers trying to cross the picket line at the 50th St. gate. The Picketers were locked armed at the time, refusing to let anyone pass. The chief approached Mr. Justice and asked him to move so workers coul [sic] go to work. Mr. Justice stated that he wasn't. At that time, Chief Hinman arrested Mr. Justice.[18]

This memorandum reported that Jerry L. Justice was guilty of the alleged violation.

The final memorandum involving Jerry Justice reported that he had been charged with "[t]hreatening bodily harm," on April 17, at 3:30 pm., and that the complainant was "Steve Simmer." The report contained no further information regarding this alleged misconduct.

The record evidence regarding the first of the four memoranda leaves no doubt that early on the morning of January 31, as nonstriking employee Charles King drove his pickup truck through the Company's 68th Street gate, striker Jerry L. Justice bent the antenna on King's vehicle. Justice testified that as King drove by him at the gate, he, Justice, lost his balance and grabbed the antenna accidentally. However, a photograph which shows Justice as he was bending the antenna does not corroborate his account. The picture reveals Justice standing upright, without any indication that he had lost his balance. Indeed, the position of his hand, the relaxed look on his face, and his posture, suggest that he was standing upright and in no danger of falling backwards In sum, the photograph suggests that Jerry Justice deliberately bent the antenna.

My findings as to the incident reported in the second memorandum regarding Jerry L. Justice were drawn from Police Officer Taylor's uncontradicted testimony.

On April 2, Newport News Police Officer Taylor arrested Jerry L. Justice near the shipyard's 68th Street gate for interfering with police officers. This incident grew out of the arrest of striker Jerry L. Lewis by the Newport News police for throwing a bottle at a bus as it entered the shipyard through the 68th Street gate. Jerry L. Justice observed the arrest, followed the officers and the accused to the police paddy wagon, and protested that Lewis had not thrown the bottle. Taylor repeatedly advised Jerry L. Justice to return to the picket line. When it appeared to Officer Taylor that Justice was intent upon pressing his protest, Taylor arrested him for interfering with police officers.

My findings of fact regarding the incident of April 16, which was reported in the third memorandum, are based upon Deputy Chief Hinman's testimony. At approximately 12:50 p.m., on April 16, Charles E. Hinman, while at the shipyard's 50th Street gate, observed strikers locking arms to form a barrier in front of the gate as three nonstrikers sought entry. Jerry L. Justice had joined in the locking of arms and was directly in front of the gate as the three nonstrikers approached. Chief Hinman directed Justice to permit the nonstrikers to proceed through the gate. When Justice refused, Hinman arrested him, removed him from the picket line, and charged him with violation of the Commonwealth's right-to-work law.[19]

The record testimony provided a detailed account of the alleged threat of bodily harm attributed to Jerry L. Justice by the fourth memorandum. Nonstriker Steve Simmer testified credibly that on his way to work at the shipyard's Copeland Park facility, at Hampton, Virginia, on April 17, he encountered one of a group of 40 to 50 pickets whom he later identified as Jerry L. Justice. As Simmer approached the Copeland Park gate, Justice intercepted him causing Simmer to halt. Justice called Simmer a scab, asked him why he was going to work, and then challenged him to a fight. Simmer stood his ground and suggested that Justice "throw the first punch." Shortly, a policeman approached the two, directed Justice to return to the picket line, and warned that he was trespassing on Company property. Thereafter, Simmer swore out a warrant against Justice charging him with threatening bodily harm.[20]

Two of the memoranda confronting Savas at the time he decided to discharge Jerry L. Justice provided adequate basis for depriving Justice of the Act's protection. The report of Justice's deliberate infliction of damage valued at $177.57, upon a nonstriking employee's automobile, together with the report of Jerry Justice's refusal to unlock arms, provided the Company with an honest belief that Jerry L. Justice had engaged in serious misconduct warranting termination.

The Company's defense was further aided by the General Counsel's failure to rebut the evidence recited in the two memoranda. Indeed, the record evidence demonstrated their accuracy.

The two remaining memoranda did not provide basis for an honest belief that Justice had engaged in serious misconduct. Contrary to the Company's position, I find that Jerry L. Justice's protests against the arrest of Jerry Lewis did not prevent the police from restoring order along the picket lines. Nor did his conduct result in injury or damage to property. In sum, Jerry L. Justice's flurry of excited protest constituted trivial misconduct.

Finally, the memorandum reporting that Jerry L. Justice had been charged with threatening bodily harm contained no details of the alleged incident. In the absence of a report as to the substance of Justice's remarks, Savas

[18] A second memorandum, G.C. Exh. 62(MM), contained a short summary of this incident.

[19] Jerry L. Justice's testimony diverges from that of Chief Hinman only with regard to the presence of nonstriking employees. Justice testified that he saw no one as he stood with locked arms at the 50th Street gate. Employee Carlton R. Hall, who participated in the arm-locking incident also testified that he saw no one in the vicinity of the gate at the time he and Justice stood in the arm-locked group. However, the testimony of Hall and Justice on this point left open the possibility that there were employees approaching but that the two strikers did not notice them. It also seems unlikely that strikers would lock arms without some purpose, such as barring nonstrikers from entry to a struck plant. These factors, together with my impression that Deputy Chief Hinman was a candid witness, persuaded me to credit his version of this incident.

[20] According to Justice, Simmer made provocative gestures toward the picket line at the Copeland Park gate. In response, the pickets heckled and jeered, calling Simmer a scab. Simmer challenged the pickets saying "If you think I'm a scab come and do something about it." According to Justice, at this point, he approached Simmer and said, "I'm going to break your neck.'" Simmer issued a second challenge. Justice said he would wait until Simmer got off work to accomplish that task. At this point, striker Jerry L. Lewis persuaded Justice to return to the picket line. However, as Simmer impressed me as the more candid witness giving his full recollection of the incident, I have credited his version of the incident.

could not determine whether Jerry Justice had in fact uttered such a threat.[21]

In sum, I find that two of the four memoranda afforded the Company had reasonable basis for its determination that Jerry L. Justice's misconduct warranted his termination following his earlier suspension. Accordingly, I find that neither his suspension nor his termination were violative of the Act. I shall therefore recommend dismissal of so much of the complaint as alleges that Jerry L. Justice's suspension and termination violated Section 8(a)(3) and (1) of the Act.

Andrew Lewis

Employee Andrew Lewis participated in the entire strike and was a gate captain for its duration. After the strike had ended, Lewis sought reinstatement at the shipyard. The Company advised him that it would contact him. Thereafter, by letter of April 27, the Company notified Lewis that he had been terminated effective April 24, for strike misconduct. Since his termination, the Company has not reinstated Andrew Lewis.

Vice President Savas discharged Lewis on the basis of a memorandum reporting that on February 19, Lewis was charged with violating the State's right-to-work law at the Company's 46th Street gate. In addition, the memorandum provided the following details: "Threatened to sleep with yard worker's wife crossing picket line." The memorandum also showed that a court had found Lewis guilty of the charge on April 5.

I find from the record before me that at approximately 4:15 p.m., on February 19, Lewis was one of 15 or 20 pickets walking in a circle at the Company's 46th Street gate, and chanting among other things: "Scabs can't build no ships." Lewis stepped out of the picket line and confronted a nonstriking employee, who had just walked through the gate. Lewis yelled: "Hey scab, yeah you, I'm gonna screw your wife, sure you get an early start in the morning, I want to have plenty of time to take care of your home life."[22]

However, contrary to the Company, I find that Andrew Lewis' misconduct, either as stated in the memorandum, or as shown by the credited testimony, was not so serious as to warrant termination. Granted that Lewis' language was rude, it was some of the banter to be expected between strikers and nonstrikers at or near a picket line. There is no showing that Lewis made any effort to carry out his threat or accompanied his extravagant warning with any expression of immediate intent to inflict the stated indignity upon the nonstriker's wife. While I do not condone the affront which Lewis cast upon the nonstriker, this minor disorder represented the only instance of strike misconduct attributed to Lewis.

In any event, I find that the Company did not have adequate basis for a honest belief that Lewis had engaged in such serious strike misconduct as to warrant termination. I further find therefore, that by terminating Andrew Lewis, the Company violated Section 8(a)(3) and (1) of the Act.

Jerry L. Lewis

Employee Jerry L. Lewis participated in the entire strike as a picket. On April 27, after the strike's conclusion, Lewis reported to the Company's shipyard for reinstatement, and was told that the Company would notify him when to report to work.

The Company, by letter dated April 30, notified Lewis that strike misconduct attributed to him was under investigation and that he would be informed of the outcome. Eight days later, the Company notified Lewis that he was terminated effective April 23 because of his strike misconduct. To date, the Company has not offered to reinstate Jerry L. Lewis.

Vice President Savas decided to terminate employee Jerry L. Lewis after considering four memoranda reporting that Lewis had engaged in strike misconduct. The first, without giving details, reported that Lewis had been charged with violation of the Commonwealth's right-to-work law and indicated that this incident occurred at 6 a.m., on February 1.

The second memorandum announced that Lewis had been charged with breach of the peace and gave February 9 at 12:25 as the time of the alleged misdeed. No other details appeared in this memorandum.

From the third memorandum, Savas learned that at 12:35 p.m., on March 30, Jerry L. Lewis committed a breach of the peace in the vicinity of the shipyard. The memorandum recited the following details:

> Officer McArthur stated that Mr. Lewis and several men were walking down 35th St. When they passed him Mr. Lewis asked if he worked in the yard, and officer McArthur told him that he did. Mr. Lewis the [sic] called him a scab. Mr. McArthur told Mr. Lewis that he was no scab. Mr. Lewis then told

[21] In any event, Justice's verbal assault upon Simmer did not amount to a threat of bodily harm. Instead, it was merely a challenge which could easily be fended off, as Simmer did. Thus, Jerry Justice's confrontation with Simmer did not warrant suspension or termination.

[22] I based my findings as to Andrew Lewis' misconduct upon Police Officer Thomas Duggan's testimony. I have rejected the contrary testimony of Lewis, and witnesses Lance Bond, Willie Carter, Jr., and Janet Gaston.

Unlike Officer Duggan who seemed sure of his testimony, Lewis, when asked on cross-examination about what he had said to his fellow pickets about the nonstriker involved in this incident, answered: "I don't remember. I might have said something, but I just don't know." On further cross-examination, Lewis expressed uncertainty as to what he might have said to the people on the picket line regarding the nonstriker. Further, Lewis seemed less than conscientious about providing definite answers on cross-examination. Employee Lance Bond, who was a strike gate captain at the 46th Street gate, recalled an incident in which Lewis, upon seeing an employee leaving the shipyard, exclaimed to his fellow pickets that the nonstriker was his neighbor and was a scab and that Lewis told the nonstriker "I'll see you tomorrow." However, Bond was unable to approximate the date upon which he heard Lewis make these remarks. It also appears from Bond's testimony that at the time Lewis confronted the nonstriker, Bond was not paying particular attention to Lewis' remarks. In contrast, Officer Duggan was attentive to Lewis' encounter with the nonstriking employee.

I also have rejected employee Jane Gaston's testimony which substantially accords with Lewis' version of the incident. Gaston admitted that she was on the picket line in front of Lewis at the time in question and only looked at Lewis "[a]bout every 15, 20 minutes or so." It thus appears that during such a 15 or 20-minute hiatus, Lewis could have stepped off the picket line and uttered the remarks attributed to him by Officer Duggan, without Gaston's knowledge. Again, Duggan's attentiveness and demeanor persuaded me that he was the more reliable witness.

The value of Willie Carter, Jr.'s testimony was seriously impaired by his admission that some of Andrew Lewis' remarks may have escaped his hearing during this incident.

> him that he was a scab and his Shit Face [sic] wife was a scabb [sic] too.

The memorandum also reported that Lewis had been found guilty as charged.

The fourth memorandum reported that Jerry L. Lewis was charged with throwing an object at a moving vehicle; that the alleged offense occurred at 4:13 a.m., on April 2, at the shipyard's 68th Street gate; and, that Officer Dawes was involved. The memorandum also provided the following details:

> The officer stated that while he was working the strike at 68th Street gate he observed Mr. Lewis and Mr. Jerry Lewis and Mr. Jerry Le Jessup in the croud [sic] on the above date and time. Off. Daws [sic] stated that he watched Mr. J. L. Lewis very closely. Mr. Lewis left one side of the gate and went over to the other side of the gate and got behind the crowd there. He then threw a coke bottle at a Newton Bus that was going into the shipyard to work. The officer went inmediately to Mr. Jerry Lee Lewis and arrested him.

Finally, the memorandum revealed that this allegation had been referred to a grand jury.

The credited record evidence provided the following facts regarding Jerry L. Lewis' strike misconduct: The first incident occurred on February 1, at the shipyard's 68th Street gate. As vehicles were entering the gate, Lewis jumped out directly in front of one of them and put his hands up. The driver slammed on his brakes to avoid striking Lewis. Prior to this incident, the local police had warned the pickets against obstructing or touching vehicles passing through the gate. Officer Roth, who observed this incident, immediately arrested Lewis for violating the Commonwealth's right-to-work law.[23]

The second incident referred to in the memoranda, occurred on February 9, at the shipyard's 37th Street gate. Truckdriver Isaac S. Blount had just completed delivering milk for his employer, Miller' Dairy. As Blount was leaving the shipyard through the 37th Street gate, he stopped at a traffic light. While Blount waited for the light to change, three pickets asked him if he would carry a picket sign in support of the strike. Blount said he could not, but that he sympathized with them. Blount also rejected their request that he honor their picket line.

As Blount spoke, Jerry L. Lewis approached the gate, called Blount a "Black scab" and scolded him for crossing the picket line. Blount insisted that his employer's contract with the Navy required that he do so. Lewis rejected the explanation and called Blount a "Black scab" and a "son-of-a-bitch." Lewis put his hand in his pocket saying that if Blount "told him that again" he, Lewis, "would blow [Blount's] brains out. . . ." At this, Blount took out a pistol and Lewis broke off the confrontation.[24] Blount later reported this incident to his employer.

A third incident not reported in the memoranda occurred shortly after noon, on March 30. Howard Bell, manager of the shipyard's food services, left the yard through the 35th Street gate to visit a food store. Bell, who is black, passed through the gate and was met by pickets who addressed racial epithets at him. As Bell crossed the street, one of the pickets, Brown, who is also black, pursued him continuing the harangue. Bell responded defiantly. The two continued their exchange until the police intervened, inviting Bell to file a charge against Brown.

When Bell had completed his business at the store, he retraced his steps toward the 35th Street gate. Enroute, he passed Jerry L. Lewis and Wayne Crosby. As Bell passed the two, Lewis told Crosby: "If the man wants to f—k his wife, he can." Moments after this encounter, Bell again passed Lewis and Crosby. As Bell walked by, Lewis turned to Crosby and said, "If a man wants to screw his wife, he can." At this, Bell scolded the two for participating in and encouraging exchanges between Bell and the other black pickets. Lewis ignored Bell's remarks and as Crosby caught Lewis around the shoulder, the latter said, "F—k him and f—k his wife too." Finally, Lewis told Crosby: "Let me go so I want to give him a reason to have me arrested." At this point, the police intervened and ended the encounter.

Later, that same day, Bell went to the Newport News City Hall where he made out a warrant against Lewis. While at City Hall, he met Jerry L. Lewis, who pointed his finger at Bell and said, "I will get you."[25]

The third incident involving Jerry L. Lewis as reported in the memoranda, occurred early on the afternoon of March 30 and involved Newport News Police Officer Robert L. McArthur, Jr., dressed in blue jeans, a flannel shirt, and a baseball cap, who stood in front of a restaurant near the shipyard. As McArthur began walking toward the shipyard, he passed a group of strikers including Jerry L. Lewis. As McArthur passed, Lewis called him a "scab." Though McArthur denied that he was a scab, Lewis repeated the word, punctuating his remark with an obscenity which he addressed to McArthur and McArthur's wife. At this, McArthur signaled to two uniform police officers who joined him as he approached Lewis. After identifying himself as a police officer, McArthur arrested Jerry L. Lewis, charging him with breach of the peace.[26]

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[23] My findings regarding the incident are based upon Police Officer Roth's testimony. Unlike Roth, who appeared to be giving his full recollection without embellishment, Jerry L. Lewis at times offered self-serving conjecture which cast doubt upon his reliability as a witness.

[24] I have based my findings regarding this second incident upon Blount's straightforward account. Here again, Lewis' testimony was marred by conjecture. Thus, Lewis speculated that Blount might have fired at him if he had run away. At another point, Lewis began to speculate about his gestures toward Blount. When I asked Lewis if he remembered the gestures, he answered: "No, sir, I don't remember." I also noted that unlike Lewis, Blount had no interest in the outcome of this proceeding. These factors persuaded me that Blount was the more reliable witness.

[25] I based my findings regarding Bell's encounters with Lewis and the other pickets upon Bell's testimony. Bell impressed me as being a more candid witness than Lewis.

[26] I based my findings of fact regarding Lewis' encounter with McArthur upon the latter's testimony. Lewis' version of the encounter differed considerably from that offered by McArthur. According to Lewis, it was a calm exchange, free of obscenities or references to McArthur's wife.

In an effort to corroborate Lewis' testimony, the General Counsel offered Bernard Dale, a union strike coordinator, who was present at the confrontation. Dale testified that shortly before McArthur's appearance, Jerry L. Lewis had engaged in a heated exchange with another individual. Dale could not remember Lewis' language, but testified that, as far as he knew, there was nothing said about McArthur's wife in the exchange

Continued

The most serious misconduct which the Company's memoranda attributed to Jerry L. Lewis occurred on April 2, at the shipyard's 68th Street gate. Newport News Police Officer R. F. Dawes testified that on that date, while 250 to 300 strikers crowded the area near the 68th Street gate, he observed Lewis throw a Coca-Cola bottle which struck a bus entering that gate. According to Dawes, the bottle struck the right side of the windshield near the top of the bus.

Jerry L. Lewis testified that he stood among the pickets near the 68th Street gate as the bus passed, heard glass breaking, looked out into the street, and saw broken glass lying in the roadway. Lewis testified that at this point he said "All right" and raised his arms vertically. According to Lewis, when a police officer promptly grabbed his arm and accused him of throwing the bottle, he denied having done so. Despite his denial and another striker's protest, the police officer arrested Lewis for throwing the bottle. On cross-examination, Lewis testified that the bottle came from behind him, and whizzed over his head, and that he heard the glass smash on impact.

Employee George Hayes was present at the bottle throwing incident. He testified that he saw the bottle being thrown by someone other than Lewis.

Employee Elizabeth Breeden, also present at the 68th Street gate on April 2, was within arm's length of Lewis at the time. Breeden testified that he did not throw the bottle which struck the bus, and that the bottle came from behind her. However, on cross-examination, Breeden conceded she was not looking at Lewis when the bottle struck the bus.

Employee Carolyn J. Hooks was at the 68th Street gate on April 2. She testified that she saw Lewis standing in front of her, within "touching distance." Hooks recalled that as she and Lewis were standing in the crowd of pickets, a bottle came over her head, hit the bus just below the windshield, fell to the roadway, and broke. According to Hooks, after the police seized Jerry L. Lewis, she and Jerry L. Justice attempted to advise the police that Lewis did not throw the bottle.

The probative value of the credible testimony of employees Hayes, Breeden, and Cooks was impaired by their admissions that they were not watching Jerry L. Lewis carefully enough to discern whether he actually threw the "Coke" bottle. However, the circumstances which each recalled suggested that the bottle's trajectory corroborated Lewis' denial that he threw it.

Officer Dawes' credible testimony does not rebut that denial. For Dawes did not recall what Lewis was doing with his hands shortly before he allegedly threw the bottle. Further, although only 15 or 20 feet distant from Lewis, Dawes admitted on cross-examination, that he never saw Lewis with a bottle in his hand prior to the time Lewis allegedly threw the bottle. In sum, therefore, I find that the General Counsel has shown by a preponderance of the credited evidence that contrary to the Company's memorandum, Lewis did not throw a bottle at a bus on April 2.

The final incident reported to Vice President Savas as ground for terminating Jerry L. Lewis occurred on April 16, in the vicinity of 38th Street and Washington Avenue, near the shipyard. Sergeant David E. Burgess, along with other members of the Newport News police force, were moving down the block, enforcing a dispersal order against pickets. Sergeant Burgess came upon two individuals standing at the corner of 38th Street and Washington Avenue. Burgess told them of the dispersal order and instructed them to leave the area. One of the individuals complied with Burgess' order. The second, who Burgess later identified as Jerry L. Lewis, stood his ground. Burgess repeated the dispersal order. Lewis stood fast. When Burgess made a third attempt to secure Lewis' compliance with the dispersal order, Lewis responded with: "You can get f—d, I can go any Goddamn place I want." Burgess arrested Lewis for unlawful assembly, breach of the peace, and resisting arrest.[27]

Returning to the memoranda confronting Vice President Savas, I find that three were inadequate. The reports of strike misconduct which allegedly involved Lewis on February 1, February 9, and April 16, did not contain sufficient details to establish an honest belief that Jerry L. Lewis' misconduct on those 3 days either taken separately or cumulatively was sufficient to warrant his discharge. See *Bromine Division, Drug Research, Inc.*, 233 NLRB at 260.

Jerry L. Lewis' misconduct on March 30, alleged as a breach of the peace in a memorandum, did not warrant termination. Lewis apparently assumed that McArthur, a civilian-attired police officer was a nonstriking shipyard employee. Lewis, use of "scab" and an obscene reference to McArthur's wife, who was not present, were examples of the rude language to be expected near a picket line. I find, therefore, that Jerry L. Lewis' resort to such verbal abuse did not provide the Company with lawful ground for terminating an unfair labor practice striker such as Lewis.

Nor do I agree with the Company that the bottle-throwing incident of April 2, provided a lawful ground for Lewis' termination. For, assuming that Lewis' perpetration of that misdeed would justify his termination, the General Counsel has shown that Lewis did not throw the bottle.

In sum, I find that none of the incidents of misconduct attributed to Jerry L. Lewis in the Company's memoranda, whether considered individually or cumulatively, was sufficient to warrant termination. Accordingly, I find that by terminating Jerry Lee Lewis for strike misconduct, the Company violated Section 8(a)(3) and (1) of the Act.

Tyrone Smith

Employee Tyrone Smith participated in the strike as a picket. At the strike's conclusion, Smith reported to the

between Lewis and McArthur. On cross-examination, Dale admitted that while he was standing with Lewis during the exchange with McArthur, there was "some foul language used . . . ." Dale also admitted that he he did not hear the entire exchange between Lewis and McArthur.

Dale's uncertainty as to what Lewis said to McArthur, and my impression that McArthur was a conscientious witness providing his recollection of the incident convinced me that McArthur's version of his exchange with Lewis was the most reliable.

[27] My findings regarding April 16 are based upon Sergeant Burgess' testimony. Lewis testified that he did not remember any contact with Burgess on April 16.

Company for reinstatement and was told that he would be notified when to return.

By letter of April 27, the Company notified Smith that he was under investigation for alleged strike misconduct, and that he would be notified of its decision regarding disciplinary action. A company letter dated May 8, notified Smith of his termination effective April 23, because of strike misconduct. Thereafter, on January 16, 1980, the Company reinstated Tyrone Smith.

Vice President Savas relied upon two memoranda in deciding to terminate Smith. The first indicated that at 4:10 p.m., on March 17, Smith was charged with violating the right-to-work law, being drunk in public, resisting arrest, and assaulting a police officer and that the misconduct occurred at the shipyard's 37th Street gate. However, this memorandum provided no factual account of the incident.

The second memorandum concerned the same incident, reported Dorner and Bell as officers in the case, and provided the following evidence in support of the charges against Tyrone W. Smith:

> Officer Dawner [sic] testified that while he was working in the street at 37 St. [sic] Gate, [sic] there were three men picketing there. Mr. Smith was one of the men, [sic] A man came out of the shipyard, and Mr. Smith jumped over in front of the man, blocking the mans [sic] passage. He then told the man, 'You ain't Shit [sic].' He was arrested by officer Dorner and Off. Bell. He was charged with vio [sic] of right to work law. After they searched him and put him into the police vehicle, he had a srong [sic] odor of alcohol about his person, so he was charged with being drunk in public. When the wagon got there the officers proceeded across the street with Mr. Tyrone W, [sic] Smith. He pulled away from them several times before they could get to the patrol wagon. He became very abusive toward the officers. He told them to keep their goddamn [sic] hands off of him. He called them S.O.B.'s. He was advised that additional chg. was placed on him. He then began to struggle with the officers trying to get away, [sic] after [sic] several minutes Mr. Smith was subdued. He then hit Off. Dorner in the mouth and beside the head.

This conduct attributed to Smith in the above-quoted memorandum was observed by Newport News Police Officers David Dorner and Clarence Belt. I find from their testimony, that at approximately 4:10 p.m., on March 17, at the Company's 37th Street gate, Tyrone Smith, who was one of three pickets, ran towards a worker who was leaving the gate, and after coming within an inch or two of the worker's face hollered, "scab, scab, you ain't shit." The employee stopped in his tracks. Within a second or two, Officer Dorner grabbed Smith and moved him out of the way to allow the worker to pass. Dorner arrested Smith for violation of the Commonwealth's right-to-work law.

Officers Dorner and Belt conducted Smith to a police car. After the officers entered the car, Smith directed an obscenity at Officer Dorner, who noted that Tyrone Smith's eyes appeared red and glassy. As a result of Smith's conduct inside the police car, Dorner charged him with breach of the peace. Further, Dorner charged Smith with being drunk in public, upon his own observation of Smith's appearance and conduct.

The two officers and Smith remained in the automobile for 15 or 20 minutes. Officer Dorner then conducted Smith across the street toward a police van. While the two were walking, Dorner attempted to grab Smith's arm. However, Smith pulled the arm away, and told Dorner "to keep [your] Goddamned hands off of [me]." Despite Smith's resistance, Officer Dorner pushed him into the police van. In the process, Smith swung his arm hitting Dorner's head. Finally, it required the force of three police officers to put handcuffs on Smith.[28]

Contrary to the Company, and in agreement with the General Counsel, I find that Smith's conduct on May 7, did not deprive him of the Act's protection. Smith's verbal attack upon the nonstriker while undoubtedly an unpleasant experience for the victim did not deter him from proceeding on his way. Further, Smith's rude language was unaccompanied by any threat of physical injury and was the typical impulsive reaction of a striker when confronted by a nonstriker at a plant gate.

Similarly, although Smith's reaction to the police who arrested him is not to be condoned, it must be noted that this misconduct occurred away from the picket line, did not involve nonstrikers, and was an emotional reaction to what Smith perceived, apparently, as unduly harsh treatment. Thus, I find that Smith's scuffle with the arresting police whether considered in isolation or together with Smith's verbal abuse of a nonstriker, did not warrant termination. I therefore find that by terminating Smith effective April 23, the Company violated Section 8(a)(3) and (1) of the Act.

Jeffrey R. Trussell

Shipyard employee Jeffrey R. Trussell supported the strike and served as a picket. On April 25, after the strike had ended, Trussell reported to the shipyard where he was advised that the Company would let him know about reinstatement. Thereafter, by letter of May 8, the Company instructed Trussell to return to work no later than May 17. The letter also stated that the Company was investigating his alleged strike misconduct and that disciplinary action might result. Trussell returned to work on May 17. He remained employed at the shipyard until the Company discharged him on June 14 for strike misconduct. To date, the Company has not reinstated Trussell.

Savas based his decision to discharge Trussell upon a memorandum which reported that this employee was arrested on April 16; that he was charged with violation of the Commonwealth's right-to-work law; that the alleged violation occurred at the Company's 50th Street gate; and, that the police officer involved in the matter was Lt. Raines. The memorandum also showed that Trussell was found guilty of the charged offense. Finally, the

[28] I based my findings regarding Smith's misconduct upon the testimony of Officers Dorner and Belt who testified in a candid manner, free of emotion. In contrast, Tyrone Smith seemed to grow insensed as he testified about his encounter with the Newport News police. His testimony regarding this encounter reflected hostility toward the police because of what he perceived to be harassment and physical abuse. I also took into account Tyrone Smith's status as an alleged discriminatee, and Officers Belt's and Dorner's lack of interest in the outcome of this case.

memorandum set forth the following account of Trussell's misconduct:

> Lt. Raines stated that on the above date he was at 50th & Wash. ave. [sic] working the strike, he [sic] saw Mr. Trussell along with the rest of the picketers at the 50th St. gate, lock arms shoulder to shoulder and saying "I shall not be moved," there [sic] several workers turned back because they couldn't get by. Lt. Raines the [sic] placed him under arrest. The crowd held him and there was quite a struggle.

I find from Lt. Raines' testimony that at or about 12:50 p.m., on April 16, a crowd of pickets arrived at the shipyard's 50th Street gate, where "they interlocked arms and stood shoulder to shoulder and started chanting that they would not be moved." Raines observed that "at least one male person in a white hard hat attempted to get in the yard and he was denied admission." At this point, Raines together with several other police officers, including Police Captain Saunders, approached the pickets. The police captain ordered the pickets to cease blocking the gate. There was no response to the order. Raines and the other police began clearing the gate area.

Raines attempted to separate Jeffrey Trussell from the mass of pickets by pulling him. This effort was unsuccessful. Lt. Raines then used his night stick to push members of the crowd back. He grabbed Trussell and pulled him from the crowd. Raines took Trussell to a patrol wagon and advised him that he was under arrest for violating Virginia's right-to-work law.[29]

In *Coronet Casuals, Inc.*, 207 NLRB at 305–306, the Board recognized that pickets who interfere with the ingress or egress of nonstrikers for a few minutes do not by such conduct, alone, remove themselves from the Act's protection. Here, the memorandum reporting Trussell's misconduct failed to disclose how long he actually blocked the gate. Thus, Savas lacked a material fragment of evidence when he decided to terminate Trussell. I find, therefore, that this gap deprived both his decision to terminate and the earlier decision to suspend Trussell of the necessary factual support for an honest belief that this employee's misconduct on April 16 was serious enough to warrant such actions. I therefore find that Trussell's suspension and termination violated Section 8(a)(3) and (1) of the Act.[30]

Jack P. Welsh

Employee Jack P. Welsh participated in the strike for its duration. He also picketed the shipyard. On April 23, Welsh went to the shipyard and sought reinstatement. The Company told him that he would be notified about a reporting date.

By letter of April 30, the Company notified Welsh that it was investigating strike misconduct charges against him. By letter of May 8, the Company advised Welsh that, pending completion of the investigation, he should report to work no later than May 17. However, Welsh returned to work at the shipyard on May 21, and continued to work there until his termination on June 29, for strike misconduct. Thereafter, on January 16, 1980, the Company reinstated Welsh.

Vice President Savas discharged Welsh based upon a memorandum reporting Welsh's arrest on April 16, for breaching the peace at the Company's 33rd Street gate, at 8:20 a.m., on the same date. The report stated that the officer involved in this case was Newport News Police Officer David A. Seals. The memorandum provided the following evidence regarding Welsh's alleged misconduct:

> Officer Seals stated that while he was walking in 33 st. [sic] he saw Mr. Welsh push a motorcycle over, causing it to knock two other motorcycles over. He was working strike duty at the time.

Finally, the memorandum stated that Welsh had been found guilty of the offense charged.

I find from Officer Seals' testimony that at or about 8:20 a.m., on April 16, he was in the "no hundred block of 33rd Street" walking in the direction of the shipyard's 33rd Street gate. He observed a man, later identified as Welsh, walking west on the north side of 33rd Street. Welsh walked to the edge of a motorcycle parking area, approximately 100 feet east of the shipyard's 33rd Street gate, leaned over, and pushed the nearest of three motorcycles. The motorcycle fell away from Welsh and hit a second motorcycle, which knocked over a third motorcycle. Seals ran after Welsh, arrested him and charged him with breach of the peace.[31]

Where a striker has shown hostility by kicking a nonstriker's automobile as it passed through a picket line, without inflicting any damage, the Board has refused to deprive the offending striker of the Act's protection, *Gold Kist, Inc.*, 245 NLRB 1095, 1100 (1979). Here, Welsh's misconduct as reported in the memorandum and in Officer Seals' credited testimony, was a single isolated instance of toppling three motorcycles, without resulting damage. This misdeed did not render Welsh unfit for

[29] Employee Carlton Hall, who testified for the General Counsel about this incident, frankly admitted that he did not know where Trussell was during the picketing at the 50th Street gate. Thus, his testimony did not support the General Counsel's attempt to rebut Lt. Raines' testimony. Nor did Trussell's testimony accomplish that task. For his version of the incident was sketchy and tended to confirm Lt. Raines' version. As Lt. Raines impressed me as being a careful and honest witness, I have, with two exceptions, based my findings regarding Trussell's participation in the arm locking upon his testimony.

Raines' apparent uncertainty as to the number of pickets involved caused me to look to the testimony of Trussell and Hall, both of whom appeared more certain about number. I therefore find that Trussell was among 20 to 25 pickets who locked arms.

[30] In any event, even if the memorandum considered by Vice President Savas were sufficient to support an honest belief that Trussell's blockage of the 50th Street gate warranted loss of employment, the record rebutted the evidence set out in that memorandum. For as found in the preceding footnote, such blockage was of approximately 5 minutes' duration, too short a period to warrant the suspension or the termination imposed upon Trussell. Thus, I would find in these circumstances that the Company violated Sec. 8(a)(3) and (1) of the Act by suspending and terminating Trussell for strike misconduct.

[31] Welsh's version differs substantially from Seals'. According to Welsh, as he was walking down 33rd Street at approximately 7 a.m., on the morning of April 16, he saw two men knock over the motorcycles. Welsh also testified that two Newport News police officers chased the two men, failed to catch them, and then grabbed Welsh. Thereafter, Welsh's testimony is replete with details of abuse by the police.

In resolving issues of credibility raised by Welsh's and Officer Seals' testimony, I considered Welsh's hostile tone while testifying about the actions of the Newport News police. I also noted Welsh's status as an alleged discriminatee. In contrast, Officer Seals was a straightforward witness, whose attitude was not clouded by emotion, and who had no stake in the outcome of these cases. I therefore based my findings of fact regarding Welsh's misconduct upon Officer Seals' testimony.

continued employment at the Company's shipyard. Nor did it provide the Company with ground for an honest belief that Welsh had engaged in serious misconduct. I find therefore that Welsh's suspension from April 23 to May 17, during the investigation, and his termination on June 29, because of this incident, were both violative of Section 8(a)(3) and (1) of the Act.

Arizona White

Employee Arizona White joined in the strike at its inception and was a picket for its duration. White went to the shipyard on April 25, seeking reinstatement. The Company advised him that it would notify him when to return to work. By letter of April 27, the Company notified White that, because of his strike misconduct, he was terminated effective April 25. The Company has not reinstated White.

The memorandum upon which Vice President Savas based his decision to terminate White showed that White had been charged with "(1) Concealed weapon (knife) (2) Nails in roadway." It also appears from the memorandum that White's misconduct occurred on February 13, at 4:27 p.m., at 44th Street and Marshall Avenue, which location, according to a large scale map received in evidence, is near the shipyard. The memorandum also showed that White was convicted of both offenses.

At approximately 4 p.m., on February 13, near the shipyard's gate no. 3, at 44th Street and Marshall Avenue, Newport News Police Officers Thomas L. Penney and T. R. Sharp were observing pedestrian traffic going in and out of the Company's Designers Building, and pickets, at gate no. 3, one of four entrances to the building. Sharp, looking through a pair of binoculars, observed a picket, Arizona White, at one of the vehicular gates reach for something in his pocket, place it on the road and adjust it with his feet. Sharp also observed that after a group of three or four vehicles had exited the gate, White would appear to be placing more objects in the path those vehicles had taken going through the gate. Using his binoculars, Officer Penney observed Arizona White put his hands in his pocket, look down at his feet, and then stand with the inner portions of his feet together as if he were trying to make an object stand up in the road.

The two officers approached Arizona White at the gate for closer investigation. When the two officers arrived at White's location, they noticed that there were several roofing nails standing on their flat heads on the pavement, with their points sticking straight up in the air, near where White was walking. When Officer Sharp questioned White about the nails, he denied having any knowledge about them.

Officer Sharp arrested White for placing hazardous materials on the roadway. Checking White's pockets, Sharp found nails similar to those on the nearby pavement. Sharp also charged White with carrying a concealed weapon, after finding a switchblade knife in the right front pocket of White's pants.[32]

The switchblade knife which Arizona White carried in his pocket and which Newport News Police Officers Penney and Sharp discovered when they searched his pockets did not provide grounds for the Company's honest belief that White had thereby engaged in such serious misconduct as to warrant discharge. For it does not appear that White brandished or displayed the knife while picketing. On the contrary, he kept it out of sight in a pocket. Thus, White's knife provoked neither fear nor violence among the nonstriking employees crossing the picket line of which he was a member. But for its discovery by the two policemen, White's knife would have remained concealed on his person. Accordingly, I find that Arizona White's possession of a knife in his pocket did not provide Savas with any ground for terminating him.

A different result is required by the General Counsel's failure to show that contrary to the memo confronting Savas, White did not throw nails on a road entering the Company's premises through a gate. Indeed, I find that the evidence supported the contrary proposition. In light of the considerable amount of tire damage inflicted upon nonstriking employees during the strike, Arizona White's effort towards causing more of the same type of damage amounted to serious misconduct warranting discharge. *Giddings & Lewis, Inc.*, 240 NLRB at 451 (Al Green). Accordingly, I shall recommend dismissal of that portion of the complaint which alleges that White's discharge violated Section 8(a)(3) and (1) of the Act.

William Whitt

Employee William Whitt participated in the strike from its inception until it ended on April 23. He also picketed the shipyard. On May 3, Whitt reported to the Company's personnel office seeking reinstatement, but was advised that he would be notified when to report. By letter of April 30, the Company warned Whitt it was investigating strike misconduct allegations against him, and that it would notify him of possible disciplinary action against him. However, by letter of May 8, the Company invited Whitt to return to work no later than May 17. On or about May 17, Whitt returned to work at the Company's shipyard and continued to work there until his termination on June 27, for strike misconduct.

Vice President Savas based his decision to discharge Whitt upon a memorandum which showed that Whitt had been arrested on April 17, for misconduct which had occurred at 3:30 p.m., on that same day. The list of witnesses were: "R. K. Davis," and "Mr. Hughes." The alleged misconduct was destroying private property. The situs of the misconduct was the shipyard's gate at 35th

[32] As Officers Penney and Sharp appeared to be giving their full recollections in straightforward and plausible accounts, I have credited their testimony regarding White's misconduct on February 13. In rejecting White's version, I noted that when asked to describe what he was doing with his hands and feet at the time in question, he gave inconsistent and speculative answers. He also testified inconsistently about some nails he assertedly picked up February 13, between gates 3 and 4. These flaws and his belligerent attitude toward Company counsel during cross-examination impaired his credibility.

Nor was White's version materially aided by the testimony of employee Robert Tilson, who was on the picket line with White on February 13. On cross-examination, Tilson admitted that while picketing that day, he looked at the cars and drivers coming through the gate and that he could not remember the picket sign White was carrying, or whether he wore gloves. These gaps in Tilson's memory suggest that he was not paying much attention to Arizona White's conduct, as they picketed together on the afternoon of February 13. Nor was there any showing that Tilson watched White's hands that afternoon.

Street and West Avenue. The memorandum presented the following account of the incident:

> Mr. R. K. Davis was parked inside of the shipyard, and saw Mr. Whitt kick the door of Mr. Hughe's [sic] car while he was coming to work at the shipyard. He also saw Mr. Whitt kick the door in on Mr. Romayne's car. This all happened at the 35 Street gate.

The report showed that Whitt had been convicted of the alleged offense. The report also stated that restitution would be made to "Mr. Hughes"[33] in the amount of $40 and to "Mr. Romayne"[34] in the amount of $105.

The credited testimony before me showed the following: Whitt joined the picket line at the Company's 35th Street gate at approximately 5 a.m., on the morning of April 16. At some point between 5 a.m. and 7 a.m., Whitt and 18 to 20 other pickets were stationed at the shipyard's 35th Street vehicular gate, " hollering at the people going in and calling them scabs, and such as that." Whitt admitted that he kicked a "couple" of automobiles as they entered the gate.

As employee Blaine W. Hughes drove his car through the gate where Whitt was picketing, Hughes heard a noise in the back of his car. When he reached his destination in the shipyard, Hughes found a dent in the lower panel of the right rear door of his automobile. He estimated the cost of repair for this damage was between $35 and $40. Whitt paid $40 to Hughes as compensation for that damage.

As employee Michael J. Ramay drove into the shipyard, at or about the same time as Hughes, Whitt kicked Ramay's car one time, causing a dent. Whitt paid $105 to Ramay as compensation for that damage, plus two other dents which were present before Whitt kicked Ramay's car.[35]

In *E-Systems, Inc.*, 244 NLRB 231, 234 (1979), the Board held that economic strikers Chapman and Russ did not lose the protection of the Act by causing minor damage to a nonstriker's automobile as it passed through the picket line into the plant. However, the Board's holding rested on findings that the damages were not attributable to the strikers' willful misconduct and the offending strikers had made restitution.

Contrary to the General Counsel's suggestion, I find the Board's treatment of strikers Chapman and Russ in *E-Systems, Inc., supra*, has no application here. For the damages inflicted upon Hughes' and Ramay's automobiles by Whitt resulted from the latter's deliberate actions. Nor do I agree with the General Counsel's suggestion that the Board's decision in *Alcan Cable West*, 214 NLRB 236 (1974), governs the outcome here. In *Alcan*, the Board found that unfair labor practice striker G. Baldwin, tore up nonstriker Brewer's automobile mirror under circumstances which suggested that Baldwin lost his balance, and where the extent of the damage thus caused was uncertain. The Board also noted that Baldwin's conduct "was the only incident involving this employee [214 NLRB at 236]."

In the instant case, Whitt deliberately inflicted damage upon the automobiles of two nonstriking employees as they passed through the picket line into the shipyard. Such conduct was likely to either intimidate the victims or provoke them into violence. The damage caused to the nonstriking employees was not insignificant. In sum, I find that William Whitt's deliberate attempts to inflict damage upon automobiles driven by nonstriking employees was sufficiently serious to permit the Company to discharge him. *Meilman Food Industries, Inc.*, 234 NLRB 698, 750 (1978). That Whitt later made restitution for the damage he willfully inflicted did not materially diminish the seriousness of his misconduct. I shall therefore recommend dismissal of so much of the complaint as alleged that Whitt's discharge was violative of Section 8(a)(3) and (1) of the Act.

Robert L. Williams, Jr.

Employee Robert L. Williams, Jr., fully participated in the strike and was a picket for its duration. After the strike ended, the Company, by letter dated April 30, advised Williams that the Company was investigating him for alleged strike misconduct. In a second letter dated May 4, the Company advised Williams of his termination effective April 25, for strike misconduct. However, on January 15, 1980, the Company reinstated Williams.

Vice President Savas terminated Williams upon a memorandum which showed that Williams was charged with: "Violation of right to work law." The memorandum also reported that Williams' misconduct occurred at 37th Street and Washington Avenue at 10:45 a.m., on February 15.

Credited testimony provided the following account of Williams' misconduct:

At approximately 10:45 a.m., on February 15, Sergeant David T. Westcott of the Newport News police watched from a police car across Washington Avenue, opposite the Company's 37th Street gate, as about 30 pickets walked a circular path in front of the gate.

Westcott also observed picket Robert Williams looking at the traffic signals which controlled the intersection of 37th Street and Washington Avenue, and the shipyard's gate. Williams continued to look at the light. A vehicle came through the outbound side of the gate, showing a left turn signal, indicating an intent to turn left onto Washington Avenue. The traffic light, which had been red, changed to green. The vehicle could have continued on its way. However, Williams stopped in front of the vehicle and remained in position until the light became red. Westcott did not consider Williams' conduct to be a deliberate blockage of the outbound vehicle.

In a few minutes, Sergeant Westcott had a second opportunity to observe Williams again block the egress of a vehicle. Williams stood in the vehicle's path when the traffic light was green in its favor. Then, the light changed back to red, and the vehicle remained standing. Williams continued to walk along the picket line only to return and again block the vehicle when the traffic light changed to green. In sum, Sergeant Westcott observed that Williams had deprived the outbound vehicle of two opportunities to make a left turn onto Washington

[33] "Mr. Hughes" is employee Blaine W. Hughes.

[34] The person referred to as "Romayne" is, in fact, employee Michael J. Ramay.

[35] My findings regarding Whitt's misconduct are based upon his admission and the testimony of company shipyard employees Robert K. Davis, Blaine Hughes, and Michael J. Ramay.

Avenue. Having satisfied himself that Williams was deliberately blocking outbound vehicles, Sergeant Westcott arrested him and charged him with violation of the Commonwealth's right-to-work law.[36]

I agree with the General Counsel that the memorandum, upon which Vice President Savas relied when he decided to terminate Williams, did not provide basis for an honest belief that Williams had engaged in strike misconduct serious enough to warrant discharge. For, as pointed out above, the Board has held that proof that a striker was charged with, and found guilty of an offense under state law, without further proof of the details of the misconduct, does not provide sufficient basis for depriving a striker of his or her jobs. Here, the memorandum confronting Savas announced that Williams had been charged with "Violation of right-to-work law." All that the memorandum added were the location, time of day, date, and a summary of the local court's disposition of the charge. There were no details of the conduct upon which the charge and the conviction were based. Thus, Savas could not determine the seriousness of Williams' misconduct. I therefore find Williams' termination violative of Section 8(a)(3) and (1) of the Act. *Bromine Division*, 233 NLRB at 260.[37]

Robert R. Perry

Robert R. Perry supported the strike and picketed the shipyard. One or two days after the strike ended, Perry presented himself at the Company's shipyard seeking reinstatement and was told not to return to work until the Company called him back.

By letter of May 4, the Company notified Perry that he was discharged as of April 24 because of his strike misconduct. However, by letter of June 8, the Company notified Perry that it had reconsidered and decided to reinstate him. The letter directed Perry to report back to work no later than June 20. However, the Company reinstated him on June 23 and has employed him at the Newport News Shipyard since that date.

The memorandum on which Savas based his decision to terminate Robert Perry shows that the latter was charged with violation of Virginia's right-to-work law, and that the incident occurred on February 5, at 4:01 p.m., at the shipyard's 37th Street and Washington Avenue gate. The memorandum also stated that Perry had been convicted of the alleged offense.

The credited testimony provided the following detailed account of Perry's misconduct:

On February 5, soon after the shipyard's 4 p.m. whistle had sounded, nonstrikers began leaving through the 37th Street gate, where Perry was stationed as a picket. Newport News Police Officer Thomas Duggan, who was stationed near the same gate, observed 30 or 40 pickets separated into two groups, one on each side of the vehicular entrance. Duggan noted Robert Perry among the pickets.

One of the exiting vehicles stopped near where Perry was standing. Perry leaned over, looked in on the driver, and exclaimed: "Hey scab, I know you, come out here, be with us, if you're not with us, you're against us, things just happen to scabs, you don't want nothing to happen to you." As he spoke, Perry waved his fist at the driver and kicked out at the automobile. Perry was 4 or 5 feet away from the vehicle and his kicks failed to make contact with the automobile. Finally, Perry snorted and directed a wad of saliva which hit one of the automobile's windows as the driver was raising it. At this point, Officer Duggan arrested Perry, charging him with violating Virginia's right-to-work law. Immediately before Perry spit at the automobile, Duggan heard another snort from another picket.

Counsel for the General Counsel sought to rebut Officer Duggan's testimony through the testimony of Robert Perry, former company employee Jeffery Clemmons, and company employee Ern Koehler, Jr. However, I noted flaws in Clemmons' testimony which cast serious doubt upon its reliability. Thus, although Perry denied having any conversation with Officer Duggan prior to his arrest by Duggan, Clemmons testified in substance that the same officer who arrested Perry had earlier threatened Perry with arrest if he did not quiet down. I also find it difficult to credit Clemmons' testimony before me that it was he who spit on the automobile rather than Perry, in view of Clemmons' prior denial, in a criminal proceeding. On cross-examination before me, Clemmons testified that his earlier testimony was untrue, and that he told the untruth to protect his job at the shipyard. This admission coupled with the circumstance that at the time of the hearing before me, Clemmons was no longer a company employee engendered the suspicion that he might now be tailoring his testimony to help Perry.

Koehler's testimony was of little probative value. All that he could testify to was that, at the time of Perry's alleged misconduct, he was to the left and rear of Koehler. Koehler also testified that he saw a police officer come into the crowd and take Perry into custody.

In contrast to the General Counsel's witnesses, Officer Duggan presented his testimony carefully, without self-contradiction, and in a detached manner. Accordingly, I credited Duggan's version of Perry's encounter with the nonstriker.

Contrary to the Company's contention, I find that Vice President Savas did not have an honest belief that Perry engaged in serious misconduct at the time it decided to discharge him. Here, again, all that he had was a reported conviction of a right-to-work law violation. Absent from the memorandum were any details of the misconduct attributed to employee Perry. Thus, the Company had insufficient information to support its conclusion that his was a serious infraction. I find, therefore, that by discharging Robert Perry on April 24, and refus-

[36] My findings of fact regarding Robert Williams' misconduct on the morning of February 15 are based upon Sergeant David T. Westcott's testimony. The General Counsel offered the testimony of Robert Williams and fellow employees Allen Evans and Alfred Johnson to rebut Sergeant Westcott's testimony. However, during the incident, Williams was picketing and Johnson was carrying on a conversation in an automobile across from the 37th Street gate. Evans, who was also across the street could not corroborate Williams' testimony that he blocked the vehicle only after it had stalled and was attempting to start up again. I also noted that the three employees left much of Westcott's testimony unrebutted. Therefore, as Sergeant Westcott was the most attentive witness to Williams' picket line activity, and as Westcott testified in a detached manner, I have accepted his version of employee Williams' misconduct

[37] In any event Williams' misconduct, even if it had been fully known to Vice President Savas at the time he decided to discharge Williams, was not so serious as to warrant discharge. *Coronet Casuals, Inc.*, 207 NLRB at 305–306.

ing to reinstate him until June 20, the Company violated Section 8(a)(3) and (1) of the Act.[38]

Brian Ribblett

Employee Brian Ribblett was a striker and participated in the picketing at the shipyard as a gate captain. When the strike ended, Ribblett reported to the shipyard seeking reinstatement.

However, the Company did not immediately reinstate Ribblett. By letter of April 30, the Company notified Ribblett that he was under investigation for possible disciplinary action, including discharge, because of his alleged strike misconduct. In a second letter, dated May 8, the Company again warned that Ribblett was under investigation because of alleged strike misconduct which might result in disciplinary action. However, in the same letter, the Company invited Ribblett to return to work no later than May 17.

Ribblett accepted reinstatement to his former job at the shipyard on May 11. He remained on the job until June 14. On that date, the Company discharged him for strike misconduct.

By letter of January 8, 1980, the Company offered Ribblett reinstatement, telling him to report for work no later than January 16, 1980. Ribblett accepted reinstatement on January 14, 1980, and has remained a company employee since that date.

The memorandum on which Vice President Savas based his decision to discharge Ribblett reported that at 8 a.m., on April 16, at 34th Street and Washington Avenue, Ribblett breached the peace and that the officer involved in the case was "Trooper Little." The evidence recited in the memorandum was as follows:

> Trooper Little stated that he and several state troopers were stopped at a traffic light at 34th & Wash. He saw Mr. Ribblett and another man standing in front of a truck that was at the light blocking it. The driver of the truck waved for them to move, but they stood there. The other man that was with Mr. Ribblett was arrested, and Mr. Ribblett then moved from in front of the truck, the [sic] truck proceeded through the light and Mr. Brian E. Ribblett kicked the truck in the quarter panel with his right foot.

The memorandum also reported that Ribblett was tried and found guilty of the alleged offense.

My findings regarding Ribblett's strike misconduct are as follows: Ribblett's strike misconduct occurred late on the afternoon of April 16, in the intersection of Washington Avenue and 34th Street, between 200 and 250 yards from the shipyard. Jack Hower, a union organizer, Ribblett, and 25 or 30 other strikers left the Union's strike headquarters walking in the direction of the Company's 50th Street gate.

As Ribblett and Hower approached 34th Street and Washington Avenue, Ribblett and Hower saw that two union members were in police custody. Hower crossed the street to ask some alcoholic beverage commission officers about the arrests.

As Hower spoke to the ABC officers, Ribblett and the other strikers stood near the intersection as a Newport News police van arrived. The Newport News police loaded the two strikers into the van, which then proceeded across the intersection and stopped.

However, Ribblett and a companion crossed Washington Avenue toward the corner where the police van had stopped. A passenger, in an unmarked pickup truck carrying roofing materials and headed away from the shipyard, began addressing abusive language to Hower, who turned to respond. Hower moved toward the passenger side of the truck, where he addressed the unidentified passenger.

In the meantime, Ribblett had stationed himself in front of the truck, about 6 feet from the truck's left side. Ribblett remained in that position only as long as it took Hower and the man in the truck to complete their verbal exchange, which lasted no more than 2 minutes. Throughout this encounter, there was no exchange between Ribblett and the men in the truck.

Hower failed to goad his assailant into leaving the protection of the truck and repeating his abusive remark. Finally, Hower waved at the truck, turned, and walked away. As soon as Hower had begun walking away from the pickup truck, the Newport News police arrested him. The pickup truck continued on its way without further incident.

After the pickup truck had departed, Ribblett went out into the street and criticized the Newport News police for arresting Hower and permitting the pickup truck passengers to leave. Ribblett also criticized the police for allowing the pickup truck to go through a red light unchallenged. After Ribblett had completed his remarks, State Trooper Little and a second state trooper took Ribblett into custody and walked him across Washington Avenue to a waiting police patrol wagon.[39]

Contrary to the Company's contention, I find that the evidence contained in the memorandum concerning Ribblett was insufficient to provide an honest belief that his misconduct stripped him of the Act's protection. In essence, the memorandum reported that Ribblett blocked a truck and kicked its quarter panel. Absent from this report was any assertion of how long Ribblett stood in front of the truck or whether Ribblett's kick caused any damage to the truck's quarter panel. If Ribblett's interference with the truck's movement was of a few moments duration, and if no serious damage resulted from his kick, his discharge was unwarranted. *Coronet Casuals, Inc.*, 207 NLRB at 307-308. As the memorandum did not show that Ribblett's misconduct exceeded the bounds set by Board precedent, his loss of employment ran afoul of the Act.

[38] I would find that Perry's misconduct, though reprehensible, was not serious enough to warrant discharge. Therefore, I would again find that by discharging Perry on April 24, and refusing to reinstate him until June 20, the Company violated Sec. 8(a)(3) and (1) of the Act.

[39] As Ribblett and fellow employee Annette Warren impressed me as candid witnesses conscientiously attempting to give their best recollection, I based my findings of fact upon their testimony. Trooper Little's testimony cast substantial doubt on his reliability by self-contradiction. Thus, on direct examination, Trooper Little testified that Ribblett ran alongside the pickup truck and kicked it in the left rear quarter panel. Later, on cross-examination, Little conceded that, although he saw Ribblett kick at the truck, he did not know whether Ribblett had actually struck the vehicle. Trooper Little also conceded that, although he testified in general district court that Ribblett contacted the truck, he contradicted himself later in circuit court. From this, I concluded that Little was an unreliable witness of this incident.

Ribblett's misconduct, set forth above, was not serious enough to permit the Company to suspend him when he sought reinstatement on April 24. Nor did his misconduct provide the Company with a valid excuse for discharging him on June 14. In light of the foregoing, I find that the Company violated Section 8(a)(3) and (1) of the Act by suspending employee Ribblett from April 24 to May 10, and by discharging him on June 14, and thereafter refusing to reinstate him until January 14, 1980.

Norman Young

Employee Norman Young participated in the strike until April 20, when he returned to work at the shipyard. On April 27 or 28, the Company suspended Young because of alleged strike misconduct. By letter of May 8, the Company advised Young that he was under investigation for alleged strike misconduct; that he would be notified of the results; and that he was to report back to work no later than the second shift on May 17.

Young reported back to work on about May 17, and continued to work for 1 week. By letter dated May 17, the Company notified Young that he was terminated effective May 15. Thereafter, by letter of January 8, 1980, the Company offered reinstatement to Young, advising him to report no later than January 16, 1980. However, at the hearing, the parties, by joint stipulation, fixed the actual date of Young's reinstatement as January 21, 1980.

Vice President Savas decided to discharge Young upon the evidence in a memorandum which reported Young's misconduct, at 4:15 on the afternoon of March 19. According to this report, Officer Duggan was involved in the incident and the offenses charged against Young were breach of the peace, resisting arrest, and assault on an officer. The location of the incident was given as "4548-Wash. Ave." The memo provided the following detailed account of Young's alleged misconduct:

> Officer Duggan was working strike duty on the above date and his attention was called to a loud noise coming from an unstairs [sic] apartment at 4548-Wash. ave. [sic]. There was music and someone talking over a loud speaker. The male that was talking over the loudspeaker was Mr. Norman Young. He said over the loud speaker that he was playing some music for the picketers, not the Mother-Fucking [sic] scabs. He then called the police that was [sic] working the strike area, "Fucking Pigs."
>
> Officer Duggan and several officers went up to his apartment to advise him to keep the noise down, but Mr. Norman would not cooperate with them. They placed him under arrest [sic] charging him with breach of peace. Mr. Young struck at officer Duggan, hitting him in the abdomen several times. There was quite a scuffle with the officers for about 5 minutes, before he was hand cuffed [sic]. Other charge [sic] were placed on Mr. Young.

The report also announced that Young had been found guilty of the merged charges of resisting arrest and breach of the peace.

My findings as to Young's misconduct are based upon the testimony of Newport News Police Officers Thomas L. Duggan and Thomas A. Zeitler. The incident began at or about 4:10 p.m., on March 19, while the two officers were stationed at the Company's 46th Street gate. As day-shift employees were exiting through that gate, the officers heard a brief interlude of loud music followed by a voice, emanating from an apartment house on Washington Avenue, across from the Company's shipyard. The speaker uttered prounion slogans, and made obscene references to nonstriking employees and the police. Included among the statements made by the voice were: "I'm playing this music for 88, and don't any of you fuckin' police, fuckin' scabs listen to this music. What time is it? It's Steelworkers time." During interludes between his remarks, the speaker played music through the loudspeaker.

Within a few minutes after it had begun, Officers Duggan and Zeitler located the source of the music and obscene language in a second floor apartment at 4548 Washington Avenue. When the police knocked at the apartment door, the music, and the voice which was that of company employee Norman Young, ceased. The apartment grew silent. Officer Duggan, accompanied by Officers Zeitler and Bradford, knocked on the apartment door and announced the presence of the police.

After a minute or two of knocking on his door, Young came to the door and opened it part way. Whereupon, he and Officer Duggan embarked upon a discussion. Young admitted that it was he who was responsible for the music and accompanying monologue. Young refused to permit the police to enter his apartment and refused to give his name. Young was harsh in his responses to Duggan, referring to the officer and his colleagues as "You fuckin' pigs." Young also asserted that he knew that the reason the police had requested his name was because they could not obtain a warrant without that information. Young struck out at Officer Duggan, and Officer Duggan grabbed Young's arm and announced that he was under arrest for breach of the peace.

Young resisted arrest. He pulled Officers Duggan and Zeitler back into his apartment. Young, using his elbow, struck Officer Duggan several times in the face and in the chest. Young also grabbed Duggan's arm. However, Officer Duggan and his colleagues finally subdued Young, wrestling him to the floor. The police handcuffed Young and took him to the police station.

As a result of this encounter, Officer Duggan sustained soreness, bruises, and a twisted leg muscle. Although Duggan struck Young, there was no showing that Young sustained any visible wounds or marks on his person.[40]

I do not agree with the Company's contention that the memoranda reporting Young's misconduct provided Vice President Savas with grounds for an honest belief that Young had engaged in serious strike misconduct. Young's use of obscene language on his loudspeaker was not accompanied by threats of force of violence. Nor did his talk incite pickets at the 46th Street gate to attack

[40] As Officers Duggan and Zeitler testified in a more straightforward manner, and presented a plausible account of their confrontation with Young, I have credited their version of the incident rather than Young's. In evaluating Young's testimony, I noted that after denying that he had a microphone in his apartment on March 19, he finally admitted that he had one, after much evasion under close cross-examination. This flaw in his testimony together with his unlikely account of police brutality in which he was beaten "down in the floor" with no showing that he suffered a bruise, a scrape, or any pain in the process, convinced me that Young was not a reliable witness.

nonstriking employees. Young's obscene language and his expressions of support for the strike were typical of the exuberant conduct to be expected in the course of an unfair labor practice strike. I find therefore that Young's remarks over the loudspeaker, although obscene in content, did not render him unfit for further employment.

Nor did Young's brief scuffle with Officers Duggan and Zeitler either by itself or in combination with his use of the loudspeaker justify his discharge. I therefore find that by initially suspending Young on or about April 28, and then discharging him, effective May 15, the Company violated Section 8(a)(3) and (1) of the Act.[41]

Frances E. Price

Employee Frances E. Price joined the strike at its inception and attempted to participate in the picketing on February 1. She returned to her job at the Company's shipyard on or about March 15. On April 23, the Company suspended Price pending investigation of her alleged strike misconduct.

By letter of May 16, the Company invited Price to return to work pending completion of the investigation and the Company's decision as to what, if any, discipline should be imposed. The letter invited Price to return to work no later than Friday, May 18. Price returned to work on or about May 21. She continued to work at the shipyard until August 30. On the latter date, the Company discharged Price and has not reinstated her since.

The memorandum to which Vice President Savas referred when he decided to discharge Frances Price reported that she had been charged with violating the Commonwealth's right-to-work law, two counts of assault on a police officer, and that the alleged misconduct occurred at 2:30 p.m., on February 1, at 68th Street and River Road. This report also showed the following details:

> Lt. Farmer stated that while he was working strike duty on the above date at 68th & River Rd. Mrs. Price walked over to a station wagon that was coming out of the yard, and beat on the window with her fists. The station wagon then stopped, then she beat on the back window with her hands. The station wagon then went on. Then another car came to the gate ot [sic] leave the yard and Mrs. Price hit his car with her hands and fists. Lt Farmer arrested Mrs. Price. She was taken over to a patrol unit that was parked near by [sic]. Later Mrs. Price got out of the patrol unit. The officer that was in the car with her, tried to keep her in the car, but he could't [sic]. Capt. Hause [sic] saw that the officer was having trouble and went over to help him. Lt. Farmer then came back to the patrol car and tried to hand-cuff [sic] Mrs. Price. While they were doing this, Mrs. Ptice (sic) kicked Capt [sic] Hausr [sic] in the chest. She also kicked Officer Smithly on the legs, and bit him on the arm.[42]

Finally, the memorandum reported that she had been found guilty of all charges.

My findings regarding Price's alleged misconduct are as follows:

At approximately 3 p.m., on February 11, Frances Price and fellow striker Debbie Redfern, approached the picket line at the Company's 68th Street gate, intending to enlist as pickets. When the two arrived, they saw nonstrikers attempting to drive through the gate. They also heard verbal exchanges between the pickets and the occupants of the automobiles.[43]

Shortly after 3 p.m., on February 1, Captain Halls, Lieutenant Farmer, and Officer McCarthy of the Newport News police were watching the traffic and pickets at the shipyard's 68th Street gate. Farmer and McCarthy noticed that an individual, later identified as Frances Price, stepped into the vehicular lane outside the gate and caused a departing station wagon to slow down. Price then approached the driver's window and began pounding on it with her hand. She also pounded the station wagon's rear window.

Before Lieutenant Farmer or Officer McCarthy could reach her, Price was pounding on the rear window of a second vehicle attempting to leave the shipyard and yelling "scab" and other strike-related sentiments. Lieutenant Farmer removed her from the gate area, took her to a waiting police car and turned her over to Officer Smithly, who was in the police car. Farmer advised Smithly to request a vehicle to take Price downtown.

Shortly after Lieutenant Farmer had turned Price over to Officer Smithly, Officer McCarthy, who stood outside the car, heard a commotion. He saw that a scuffle had ensued between Price and Smithly, as Smithly attempted to extract her from the police car. Officer McCarthy came to Smithly's assistance, grabbing Price's arm. When Smithly attempted to handcuff Price, she kicked and bit his arm. However, Officer McCarthy did not suffer any serious harm. Price continued kicking and struggling. Finally, the officers, reinforced by Lieutenant Farmer and Captain Halls, subdued Price sufficiently to permit them to carry her to a police paddy wagon, where she calmed down.[44]

I find that the information in the memorandum regarding Frances Price did not provide the Company with ground for an honest belief that he had been guilty of such serious misconduct as would warrant her discharge. Nor did her misconduct justify her earlier suspension.

Price did not accompany her slapping with threats of injury or damage, and her slapping caused neither injury nor damage. Her scuffles with the police were of brief

[41] If the Board finds that the evidence of misconduct in the memorandum was enough to sustain an honest belief that Young had rendered himself unfit for continued employment at the shipyard, I would find that the General Counsel has failed to rebut that showing and that Young's discharge did not violate the Act.

[42] The transcript shows that the police captain involved in the Price incident was Halls. Thus, it appears that the spelling of the captain's name in the memorandum considered by Savas was erroneous.

[43] My findings regarding when and why Price and Redfern went to the 68th Street gate on February 1, and the situation they found upon arrival at that location, was based on Price's credible and uncontradicted testimony.

[44] My findings regarding Francis Price's conduct were based on Lieutenant Farmer's testimony which he gave in a detached manner and without embellishment. I was thus persuaded that Farmer was a reliable witness. Price did not exhibit similar candor. She seemed eager to provide details of the encounter with the police after her apprehension, but was not so inclined when pressed for testimony regarding her encounter with the nonstriking employees and their vehicles as they passed through the 68th Street gate. She testified that she could not remember any of the words which passed between her and the nonstrikers. Her haste to pass over this topic provoked my suspicion that perhaps she did in fact remember, but would rather not talk about it.

duration, caused no serious injury, and did not lead to disorders by her fellow strikers. Accordingly, I find that Price's suspension and subsequent discharge were violative of Section 8(a)(3) and (1) of the Act.

Cyrus L. Flenner

Employee Cyrus L. Flenner supported the strike and picketed the shipyard. At the strike's conclusion, Flenner sought reinstatement.

The Company reinstated Flenner on April 25, and permitted him to work at the shipyard until May 3, at which time the Company suspended him pending investigation of his alleged strike misconduct. The Company again reinstated Flenner on May 17, pending the outcome of the continuing investigation of his alleged strike misconduct. Finally, on August 2, the Company discharged Flenner for strike misconduct and has not reinstated him since that date.

Vice President Savas discharged Flenner because of the misconduct attributed to the latter in a memorandum reporting that Flenner was arrested on April 16; that the offense occurred at 6:45 a.m., that Mr. D. Toupin had obtained the warrant against Flenner; that the offense alleged was "assault & battery"; and that the incident had occurred at the "46 St. gate." The memorandum contained the following particulars:

> Mr. Paul Toupin stated that he was going to work on the above date when he approached a picket line at 46th & Wash. [sic] He was thrown out in the street. He then approached the picket line again to go to work and was thrown back again. He was the [sic] kicked by a B/M who he doesn't know, when he started to defend himself, Mr. Flinner [sic] jumped between Mr. Toupin and B/M. Mr. Flinner [sic] then pushed Mr. Toupin back with both arms, and then he took a swing at him. He struck him in the neck area. Mr. Flinner's [sic] name was obtained by a police officer and given to Mr. Toupin, who swore the warrant.

The memorandum reported that Flenner had been found guilty of the alleged offense.

My findings as to Flenner's alleged misconduct are as follows:

On the morning of April 16, at the Company's 46th Street gate, employees Paul Toupin and Warren Doyle attempted to enter the shipyard. Present were about 25 pickets who encouraged them to leave and called Toupin and Doyle scabs. Toupin and Doyle found their entry barred by a closed and locked gate.

As Toupin and Doyle turned around and walked away from the gate, a black man came out of the crowd and struck Toupin in the back with his foot. Toupin turned to face his attacker. A white man stepped between Toupin and the black man, pushed Toupin back, and hit him. Toupin attempted to strike his assailant but Doyle restrained him and they walked away.[45]

Cyrus Flenner admitted that he was walking the picket line on the morning of April 16, at the time of the attack on Toupin. However, I also find from Flenner's, Saylor's, and employee Richard Hall's testimony that Flenner was not Toupin's attacker that morning.

Nevertheless, while Flenner was walking the picket line in front of Hall, a police officer requested him to come with him. The policeman and Flenner walked to the middle of the street, where Toupin was standing.

The policeman asked Toupin if Flenner was the man who had hit him. Toupin answered, "yes, I think it is, I'm not—yeah, I think. . . ." Finally, Toupin said, "that's him." The police officer refused Toupin's demand that he arrest Flenner. However, the officer agreed to provide Toupin with Flenner's name and address. Thereafter, Toupin obtained a warrant for Flenner's arrest. I also find from Flenner's testimony that prior to this meeting on April 16, he had never seen Toupin before.[46]

As Flenner, Hall, and Saylor were more certain of their respective recollections, and testified in a forthright manner, I have credited their testimony regarding the identification of Toupin's second assailant, and Flenner's involvement in the incident.

I agree with the Company that the memorandum regarding Flenner's encounter with Toupin provided adequate basis for an honest belief that Flenner had engaged in strike misconduct serious enough to warrant discharge. However, in agreement with the General Counsel, I find that the General Counsel has established that Flenner did not engage in the misconduct attributed to him in the memorandum. Nor does it appear that he engaged in any strike misconduct. I therefore find that by suspending Flenner during its investigation, from May 3 until it reinstated him on May 17, and discharging him on August 2, for mdsconduct of which he was not guilty, the Company violated Section 8(a)(3) and (1) of the Act.

Stanley E. Holmes

Employee Stanley E. Holmes supported the strike until April 19 or 20. From the beginning of the strike on January 31, until April 19 or 20, Holmes participated in picketing at the shipyard's 50th Street gate.

On April 19 or 20, Holmes went to the shipyard seeking reinstatement. By letter dated April 30, the Company notified Holmes that he was under investigation for alleged strike misconduct. However, by letter of May 8, the Company notified Holmes of its decision to allow him to return to work pending the continued investigation of his alleged strike misconduct. The letter instructed Holmes to return to work no later than May 17.

[45] My findings regading the attack upon Toupin were based upon the testimony of employee Toupin, Seigler, and Doyle.

[46] In an effort to show that Flenner was Toupin's assailant, the Company offered Toupin's and Doyle's testimony. However, I note that Toupin appeared uncertain as to the circumstances under which he identified Flenner. First, Toupin testified that he and Doyle pointed Flenner out to the police. Having said that, Toupin changed his mind and testified that the police had pulled Flenner "out of the lineup." After this flurry of uncertainty, company counsel created more doubt as to Toupin's recollection by using a leading question to show Toupin's certainty that he pointed Flenner out to the police. Doyle added more doubt by testifying that he and Toupin had crossed the street, reported the assault to a policeman who instructed them to locate Toupin's assailant. According to Doyle at this point Toupin and he stood there, identified Flenner as he walked by, and then Toupin and Doyle pulled Flenner across the street. My concern about Doyle's reliability increased when he described Flenner as: "A small, foreign looking man," and as "almost Chinese or something to that nature, Puerto Rican maybe." However, Flenner is neither Chinese nor Puerto Rican.

Holmes returned to work at the shipyard on that date. The Company discharged him for strike misconduct on August 29, 1 day after his conviction for violating Virginia's right-to-work law.

The memorandum confronting Vice President Savas when he made his decision to discharge Holmes reported that Holmes was arrested on April 10, and that a police sergeant, David Westcott, was the "Officer in the case." The memorandum also reported that the alleged offense occurred at 50th Street and Washington Avenue, at 12:30 a.m. The details recited in the memo were as follows:

> Sgt. David Westcott stated that while he was working strike duty at 50th & Wash. [sic] on the above date, he saw Mr. Holmes walking in the picket line. A worker was coming back to work and tried to cross the picket line. Mr. Holmes stood in front of the worker and wouldn't let him pass. The worker tried to pass, but Mr. Holmes got in front of him again. He then called the worker a mother-fucker. He was then arrested.

The memorandum goes on to relate that Holmes was found guilty of the charged offense.

I find from the credited record testimony that the incident which led to Holmes' discharge occurred at approximately 12:50 p.m., April 10, at the shipyard's gate at 50th Street and Washington Avenue. At that time, Sergeant Westcott, of the Newport News police, was on strike duty at that location. Westcott observed Holmes, who was walking the picket line. Nonstriking employees were returning to work from lunch. Holmes moved in front of one of the returning enployees, called him a "mother fucker" and blocked his way to the gate. The employee, who had a shipyard identification card indicating his status, took evasive action only to be confronted by Holmes once again. At this point, Sergeant Westcott arrested Holmes and charged him with a violation of the Commonwealth right-to-work law. Thereafter, 1 day before his discharge by the Company, Holmes was found guilty as charged.[47]

I find that Holmes' misconduct, both as set out in the memorandum considered by Savas, and in Sergeant Westcott's testimony, was a single isolated incident of minor misconduct. Holmes' resort to obscene language to vent his wrath upon a nonstriking employee was unaccompanied by any attempt to harm the nonstriker. Nor did Holmes threaten the nonstriker with harm because of his refusal to support the strike. Holmes' attempt to impede the nonstriker's entry through the plant gate, either alone, or together with the obscene language, did not exceed the limitations imposed by the Board, *Coronet Casuals, Inc.*, 207 NLRB at 306 (Whitfield) In these circumstances, I conclude that Stanley Holmes' misconduct was not of such a serious nature as to disqualify him from continued employment at the Company's shipyard. Accordingly, I find that by discharging Holmes because of misconduct, the Company violated Section 8(a)(3) and (1) of the Act.

I also find here, as in the suspensions found unlawful earlier in this decision, that the Company failed to provide sufficient evidence to show justification for suspending Holmes from April 20 until May 16. Thus, there was no showing that, as an unfair labor practice strike, Holmes was not entitled to reinstatement on April 19 or 20. The Company's refusal to reinstate Holmes, upon his request, was violative of Section 8(a)(3) and (1) of the Act.

CONCLUSIONS OF LAW

1. Newport News Shipbuilding & Dry Dock Company is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. United Steelworkers of America, AFL-CIO-CLC, is a labor organization within the meaning of Section 2(5) of the Act.
3. The strike commencing on January 31, 1979, at the Newport News Shipbuilding & Dry Dock Company's shipyard at Newport News, Virginia, and ending on April 23, 1979, was an unfair labor practice strike.
4. By discharging certain employees and suspending certain employees because of their protected participation in an unfair labor practice strike, Respondent violated Section 8(a)(3) and (1) of the Act.
5. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.
6. Respondent did not violate the Act by either suspending or by discharging employees Deborah Clark, Cecil E. Ward, William Whitt, Arizona White, Jerry L. Justice, and Joe Will Hardy.

THE REMEDY

Having found that Respondent has violated Section 8(a)(3) and (1) of the Act by discharging and suspending Stanley E. Holmes, Charles Cox, James A. Fountain, James P. Justice, Jeffrey R. Trussell, Jack P. Welsh, Brian Ribblett, Frances E. Price, Johnny H. Bradley, Norman Young, and Cyrus L. Flenner, and by discharging Robert R. Perry, Orvel L. Chambers, David R. Davis, Earl Evans, Wayne Fisers, Brad N. Harrison, Andrew Lewis, Jerry L. Lewis, Tyrone Smith, and Robert L. Williams, Jr., all because of their protected participation in an unfair labor practice strike, it will be recommended that the Respondent cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

I shall also recommend that the Respondent be ordered to reinstate the unlawfully discharged employees named above to their former positions, if it has not already done so,[48] or, if those jobs no longer exist, to substantially equivalent positions without prejudice to their seniority or other rights and privileges previously enjoyed. Additionally, it will be recommended that the employees listed above, who Respondent unlawfully suspended or discharged for their participation in the unfair

[47] Sergeant Westcott gave a detailed and logical account which he presented in a detailed manner. The General Counsel's witnesses, Holmes and employee Jerome Jacobs gave sketchy versions of the same incident. At times, the General Counsel resorted to leading questions to obtain their desired responses. These circumstances contributed to my general impression that Holmes and Jacobs were reluctant witnesses. I therefore credited Westcott's version of the incident.

[48] Respondent has reinstated Johnny H. Bradley, Orvel L. Chambers, Robert R. Perry, James A. Fountain, Robert L. Williams, Jr., James P. Justice, Jack P. Welsh, Tyrone Smith, Brian Ribblett, and Norman Young.

labor practice strike, shall be made whole for any loss of pay, benefits, or other rights and privileges they may have suffered as a result of the discrimination against them. Backpay thereon is to be computed in the manner set forth in *F. W. Woolworth Company*, 90 NLRB 289 (1950), with interest as prescribed in *Florida Steel Corporation*, 231 NLRB 651 (1977).[49] Finally, Respondent shall be ordered to expunge from the personnel records of the aforesaid employees all references to the discharges or suspensions found unlawful herein, including references to those unlawful discharges which Respondent now refers to as suspensions.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I issue the following recommended:

ORDER[50]

The Respondent Newport News Shipbuilding & Dry Dock Company, Newport News, Virginia, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discouraging membership in or activities on behalf of United Steelworkers of America, AFL-CIO-CLC, or any other labor organization, by discharging, suspending, or otherwise discriminating against employees in regard to hire or tenure of employment or any term or condition of employment because they engaged in an unfair labor practice strike.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of rights guaranteed by Section 7 of the Act.

2. Take the following affirmative action designed to effectuate the policies of the Act:

(a) Offer to Stanley E. Holmes, Charles Cox, Jeffrey R. Trussell, Frances E. Price, Cyrus L. Flenner, David R. Davis, Earl Evans, Wayne Fisers, Brad N. Harrison, Andrew Lewis, and Jerry L. Lewis, immediate and full reinstatement to the jobs to which they would have been recalled if it had not been for the discrimination against them, or, if those jobs no longer exist, to substantially equivalent jobs.

(b) Expunge from the personnel records of the following employees all references to the unlawful discharges or suspensions imposed upon them, including references to those unlawful discharges which the Respondent now refers to as suspensions:

Stanley E. Holmes	Johnny H. Bradley
Charles Cox	Orvel L. Chambers
James A. Fountain	Norman Young
James P. Justice	David R. Davis
Jeffrey R. Trussell	Earl Evans
Jack P. Welsh	Wayne Fisers
Tyrone Smith	Brad N. Harrison
Brian Ribblett	Andrew L. Lewis
Frances E. Price	Jerry L. Lewis
Cyrus L. Flenner	Robert L. Williams, Jr.
Robert R. Perry	

(c) Make whole the employees named in paragraph 2(b), above, for any loss of wages or other benefits that they may have sustained as a result of the discrimination against them in the manner set forth in the section of this Decision entitled "The Remedy."

(d) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this recommended Order.

(e) Post at its shipyard at Newport News, Virginia, copies of the attached notice marked "Appendix A."[51] Copies of said notice, on forms provided by the Regional Director for Region 5, after being duly signed by an authorized representative of Respondent, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director for Region 5, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

IT IS FURTHER RECOMMENDED that the complaint be dismissed insofar as it alleges violations of the Act other than those found above.

[49] See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

[50] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[51] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT discourage membership in or activities on behalf of United Steelworkers of America, AFL-CIO-CLC, or any other labor organization, by discharging, suspending, or otherwise discriminating against any of our employees because they engaged in an unfair labor practice strike.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the National Labor Relations Act, as amended.

WE WILL offer to Stanley E. Holmes, Charles Cox, David R. Davis, Earl Evans, Wayne Fisers, Brad N. Harrison, Andrew Lewis, Jerry L. Lewis, Jeffrey R. Trussell, Frances E. Price, and Cyrus L. Flenner, immediate and full reinstatement to the jobs to which they would have been recalled, if it had not been for the discrimination against them or, if those jobs no longer exist, to substantially equivalent jobs.

WE WILL make the following named employees whole for any loss of pay, benefits, or other rights

and privileges they may have suffered as a result of the discrimination against them, with interest; Stanley E. Holmes, Charles Cox, James A. Fountain, James P. Justice, Jeffrey R. Trussell, Jack P. Welsh, Brian Ribblett, Frances E. Price, Cyrus L. Flenner, John H. Bradley, Orvel L. Chambers, David R. Davis, Earl Evans, Wayne Fisers, Brad N. Harrison, Andrew Lewis, Jerry L. Lewis, Tyrone Smith, Robert L. Williams, Jr., Robert R. Perry, and Norman Young.

WE WILL expunge from the personnel records of the employees listed in the above paragraph all references to the unlawful discharges or suspensions upon them, including references to those unlawful discharges we now refer to as suspensions.

NEWPORT NEWS SHIPBUILDING & DRY DOCK COMPANY